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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1963

No. 592.

COCHEYSE J. GRIFFIN, et al,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al,
Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY

J. SEGAR GRAVATT
Special Counsel
Blackstone, Virginia

WILLIAM F. WATKINS, JR.
Commonwealth's Attorney
of Prince Edward County
Farmville, Virginia

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY

I.

HISTORY OF THE LITIGATION

This litigation began as *Davis, et al v. County School Board of Prince Edward and T. J. McIlwaine, Division Superintendent of Public Schools.* Under that style it went to the Supreme Court of the United States where it was one of four chool segregation cases decided as *Brown* v.

Board of Education, 347 U.S. 483 (1954). By *Brown* v. *Board of Education*, 349 U.S. 294 (1955), it was remanded. Shortly thereafter it became *Allen, et al* v. *County School Board, etc.* Its purpose was stated in *Allen* v. *County School Board, et al*, 249 F. 2d 462, Fourth Circuit (1957), thus:

> "This action was commenced *to enjoin racial segregation in the public schools* of Prince Edward County, Virginia, on the ground that provisions of the state constitution and statutory code requiring such segregation were violative of the 14th Amendment to the Constitution of the United States and therefore void." (Emphasis supplied)

That purpose was substantially accomplished when the Court of Appeals for the Fourth Circuit handed down its opinion of May 5, 1959—*Allen* v. *County School Board, etc.*, 266 F. 2d 507 (1959), holding as follows:

> "* * * that the District Judge issue an order enjoining the defendants from any action that regulates or affects on the basis of color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the *high schools operated by the defendants* in the County; and requiring the defendants to receive and consider the applications of such persons for admission to the white high school of the County on a non-racial basis without regard to race or color; and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white school in the school term beginning September 1959; and also requiring the School Board to make

plans for the admission of pupils in the *elementary schools of the County* without regard to race and to receive and consider applications to this end at the earliest possible date." (Emphasis supplied).

In the spring of 1959 the School Board submitted to the Board of Supervisors of Prince Edward County, under Sections 22-120.3 and 120.4 of the Code of Virginia, its estimate of funds needed for the support of public schools during the next scholastic year and in the alternative the amount of money deemed needed for educational purposes in the County, and requested the Board of Supervisors to fix such school levy as would net the necessary funds or in lieu thereof to make a cash appropriation for the operation of public schools or for educational purposes.

On June 2 and 3, 1959, the Board of Supervisors refused to make any levy or appropriation for public schools or for educational purposes.

The Prince Edward Educational Foundation was organized for the purpose of operating private schools in the County. During the school year 1959-60, the Foundation operated schools in the County, which were attended by most of the white children of the County and which were financed by privately raised funds.

Negro citizens of the County took no steps to provide schooling and spurned all offers of assistance in organizing and conducting schools.

Although the opinion of the Court of Appeals for the Fourth Circuit had been handed down on May 5, 1959, no order was presented for entry until April 22, 1960. That

order (R. 18) enjoined the two defendants, i.e., the County School Board and the Division Superintendent, as follows:

> "2. That the defendants, the County School Board of Prince Edward County, T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, their agents and employees, and successors in office, and all persons acting in concert with them be, and they hereby are, restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the *high schools operated by the defendants in the County* and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.
>
> "3. That the defendants make plans for the admission of pupils in the *elementary schools of the County* without regard to race or color and to receive and consider applications to this end at the earliest practicable day." (Emphasis supplied).

By the entry of this order the purpose of the litigation was accomplished, permanently enjoining the defendants against considering race in the admission, enrollment and education of children in the schools operated by the defendants. It is important to emphasize that this injunction was in essence purely negative. It did not order the then defendants to operate public schools in the County; it simply prohibited them from taking race into consideration *in the schools operated by the defendants in the County*. That injunction remains in force and has been violated by no one.

Again in the spring of 1960 the Division Superintendent

of Schools submitted on behalf of the School Board estimates required by law and requested the Board of Supervisors to make levy and appropriation for public schools or to provide money for educational purposes. The Board of Supervisors again refused or failed to make a levy and appropriation for the operation of public schools.

At about this time on June 10, 1960 the plaintiffs filed a motion asking leave to file a Supplemental Complaint and to make the Board of Supervisors of Prince Edward County, the State Board of Education and the Superintendent of Public Instruction (a State officer) parties defendant. This motion was opposed by the School Board because the Supplemental Complaint was not in aid of the injunction granted on April 22, 1960, but raised an entirely new cause of action against entirely new parties. By order of September 16, 1960, the District Court granted the motion. Motions to dismiss the Supplemental Complaint were filed by all defendants, both old and new.

In the meanwhile on July 18, 1960, the Board of Supervisors adopted two ordinances, one referred to in this litigation as an ordinance "in aid of education" (R. 108-111). It provided a sum not less than $100.00 per year to be paid to the parent of any child resident of Prince Edward County in aid of the education of such child "in a course of systematic educational instruction or training."

The Board also adopted an ordinance granting a tax exemption to any taxpayer of the County for contributions to non-profit, non-sectarian private schools located within the County, not to exceed 25 per centum of the total tax due by such taxpayer. This latter ordinance was repealed by action of the Board of Supervisors on the 3rd day of

September, 1963, a certified copy of the resolution effecting such repeal is appended to this brief.

The ordinance "in aid of education" remains in full force and effect, payments thereunder having been enjoined.

During the school year 1960-61 the Prince Edward School Foundation operated its schools in the County, charging tuition. The total amount of the tuition was slightly in excess of the aggregate amount available to a parent under the County ordinance "in aid of education" and under the State scholarship grant law contained in Sections 22-115.29 - 22-115.35, inclusive, of the Code of Virginia. During that year the schools of the Foundation were attended by the majority of the white children of the County. The parents of most of those children availed themselves of the County ordinance "in aid of education" and of the State scholarship grant law, though some sought the aid of neither County nor State. Some of the parents of Negro children availed themselves of State tuition grants and County grants in aid of education in order to send their children to school outside the County.

The motions to dismiss the Supplemental Complaint were never heard. The plaintiffs let weeks pass without requesting a date for a hearing, and on January 13, 1961, they filed a motion for leave to file an Amended Supplemental Complaint and add as a further party defendant J. W. Wilson, Jr., Treasurer of Prince Edward County. This motion was opposed by all those who then were parties defendant, and by order of April 24, 1961, the motion was granted.

The allegations of the Amended Supplemental Complaint are set forth R. 20-28.

The injunctions prayed for relief in five (5) particulars, as follows:

1. To enjoin the defendants from refusing to maintain and operate an efficient system of public free schools in Prince Edward County.

2. To enjoin the defendants from expending public funds for the direct or indirect support of any private school which for reasons of race excludes the infant plaintiffs and others similarly situated.

3. An injunction against all defendants from expending public funds in aid or in reimbursement of money paid for the attendance of any child at any private school which for reasons of race excludes the infant plaintiffs and others similarly situated.

4. An injunction against all defendants from crediting any taxpayer with any amount paid or contributed to any private school which for reasons of race excludes the infant plaintiffs and others similarly situated.

5. From conveying, leasing or otherwise transferring title, possession or operation of public schools and facilities in Prince Edward County to any private corporation, association, etc.

It will be noted that the record fails to show that any Negro child has applied for admission to the Prince Edward Foundation schools, and consequently fails to show that any such child has been denied admission to such schools on account of race or otherwise.

It will be noted that the plaintiffs did not ask for an injunction cutting off State aid to other localities in Vir-

ginia which desire to operate public schools, "for so long as public schools remain closed in Prince Edward County".

Within a week following the order of the District Court permitting the Amended Supplemental Complaint to be filed, each defendant filed motions to dismiss.

Each of the said motions was in part predicated upon a ground which was stated by the School Board as follows:

> "Said Amended Supplemental Complaint alleges new causes of action different from that alleged in the original Complaint; the relief sought is alien to that sought in the original Complaint and it is sought against persons not parties to the original suit and who were foreign to the relief sought therein."

Without attempting to be all inclusive, the motions of the several defendants were predicated upon additional grounds as follows:

1. That the Amended Supplemental Complaint is a suit against the State.

2. That it attempted to enjoin as unconstitutional the enforcement of State legislation or constitutional provisions and required a three-judge court.

3. That the doctrine of abstention should be applied.

4. That the order of April 22, 1960, does not require that schools be operated and that no right of the defendant is violated in the refusal of the Board of Supervisors of Prince Edward County to levy taxes and appropriate funds for the operation of public schools.

5. That the District Court was asked to exercise an exclusively legislative power by compelling the local legislative body to levy taxes and appropriate money.

6. That prayer C and D constituted a prayer that the judiciary exercise an affirmative legislative function and in effect amend the tuition grant ordinance and the statutes of the Commonwealth of Virginia in aid of the education of children; and that the injunction prayed under C, D and E violates the negative nature of the Fourteenth Amendment; is an injunction requiring the legislative branch to amend a legislative enactment; is an extension of the Fourteenth Amendment into the area of private individual action and by the granting of said prayers would be an unconstitutional restriction of and violative of freedoms secured to individuals by other provisions of the Constitution of the United States.

Reference is made to the motion of the Board of Supervisors for a complete disclosure of the ground upon which it moved the dismissal of the Amended Supplemental Complaint.

At this stage of the proceeding the Attorney General of the United States filed a motion for leave to intervene as a plaintiff, to add additional defendants, and to file a complaint in intervention. He sought to add as parties defendant the Prince Edward School Foundation, the Comptroller of Virginia, and the Commonwealth of Virginia. With one exception the prayers of relief in that intervention complaint were the same as those in the Amended Supplemental Complaint. That one exception was that the Attorney General of the United States sought an injunction against the

Commonwealth of Virginia, the State Board of Education, the Superintendent of Public Instruction, and the State Comptroller to restrain them from approving, paying or issuing warrants for the payment of any funds of the State for the maintenance or operation of public schools anywhere in the State so long as public schools in Prince Edward are closed. By memorandum opinion of June 14, 1961, which is unreported, but a copy of which is in the record (R. 162), the District Court denied the motion of the United States Attorney General. In that opinion the District Court pointed out that the facts in the Prince Edward litigation did not justify a comparison with those in Little Rock and in New Orleans, for, said the District Court (R. 167):

> "There has been no known defiance of this Court's orders by either the State of Virginia or the County of Prince Edward."

The District Court further pointed out:

> "That the material difference"

between the Amended Supplemental Complaint and the complaint in intervention sought to be filed, was that the Attorney General sought to enjoin the expenditure of any State funds for the maintenance of any free public schools anywhere in the State "so long as free public schools of Prince Edward County remain closed." Of this the District Court said (R. 173):

> "Such relief, if granted, would be unnecessarily punitive, in that it would require the closing of most, if not all, of the free public schools in Virginia. Whether

> the means, if legal, justifies the end is questionable, to say the least."

The District Court thereafter overruled the several motions of the defendants to dismiss the Amended Supplemental Complaint but without prejudice to their right to renew those motions; answers were filed; and the matter came on for hearing on July 24, 1961.

On August 23, 1961, the District Court handed down its memorandum opinion—*Allen, et al* v. *County School Board*, 198 F. Supp. 497 (R. 52). The court held that it was necessary to have State interpretation of the Virginia Constitution and statutes adopted pursuant thereto in order for the court to determine the question, which it stated as follows:

> "Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?"

The court held that the County ordinance "in aid of education" and the County tax credit ordinance "circumvented" or attempted to "circumvent" or "frustrate" the order of April 22, 1960, and enjoined payments or credits under the said ordinances.

It also held that the correct construction of Sections 22-115.29, et seq., of the Code of Virginia, providing for State scholarship grants, permitted the use of grants only for children resident of a locality in which public schools were being operated, and that since no public schools were being operated in Prince Edward County payment of any

State scholarship grants to residents of that County would be enjoined so long as public schools were not there operated.

Thereafter some of the plaintiffs, represented by the same counsel who represented the plaintiffs in the District Court, filed in the Supreme Court of Appeals of Virginia an original petition for mandamus under the style *Griffin, et al* v. *Board of Supervisors of Prince Edward County*, in which they alleged that the Board of Supervisors had failed and refused to levy taxes and appropriate money for the operation of public schools; that under the Constitution and laws of the Commonwealth of Virginia they were required to do so; that the failure to levy the tax and appropriate the funds was in reaction to the opinion of the United States Court of Appeals in this case handed down May 5, 1959, and because they were unwilling to appropriate money for the operation of public schools where the races were taught together. They prayed a mandamus directed to the Board of Supervisors compelling them to levy the necessary tax and appropriate the funds.

The Board of Supervisors answered, denying that the Constitution and laws of the Commonwealth of Virginia required them to make any such appropriation and denying that its refusal to appropriate money violated the Fourteenth Amendment or the order of this Court entered April 22, 1960.

All counsel met with the District Judge to discuss with him the terms of the order to be entered on his opinion of August 23, 1961, after this mandamus suit had been instituted, and after the answer of the Board of Supervisors

had been filed, and after the petitioner had filed its brief in the Supreme Court of Appeals of Virginia. These papers were laid before the District Judge, and in his order of November 16, 1961 (R. 66), he recited:

> "It appearing from statement of counsel and the copy of the suit papers that an appropriate suit has been timely instituted in the Supreme Court of Appeals of Virginia, seeking a determination of the legal question posed in this Court's opinion of August 23, 1961, namely: 'Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?' "

And the court reserved further consideration until determination by the Supreme Court of Appeals of Virginia "of pertinent provisions of the United States Constitution, the Virginia Constitution and statutes adopted pursuant thereto."

It thus having been represented to the District Court that the mandamus proceeding had been filed to settle the question propounded by the District Court, the Board of Supervisors filed its briefs in that proceeding upon all issues of state and federal law.

Whereupon, having participated in the above mentioned representation to the District Court on the basis of which the recitation above-quoted was made in the order of November 16, 1961, the plaintiffs in the mandamus proceeding filed their reply brief, Section VI of which had the following heading:

"The Pleadings in This Case Present No Federal Question."

The first sentence under the heading was:

"There are no federal questions in this proceeding."

The Supreme Court of Appeals of Virginia rendered its opinion in March, 1962, in *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, (1962), in which it stated that the plaintiffs disclaimed the raising of any federal question and that in the light of that disclaimer the Supreme Court of Appeals stated that it perceived none. The Supreme Court held that under Section 136 of the Constitution of Virginia it lie within the discretion of the Board of Supervisors whether it would levy any tax or make any appropriation for the operation of public schools and that there is no judicial process by which the court could compel the levy of a tax and the appropriation of money.

Thereafter the plaintiffs filed a motion in District Court of a type unknown to any form of recognized procedure which they entitled "a motion for further relief" in which they sought to raise new matter and new questions; the defendants filed a motion to dismiss the proceeding or in the alternative to abstain from determining the issues presented in the Supplemental Complaint and to dismiss the plaintiffs' motion for further relief. This motion to dismiss was predicated upon the representation of the plaintiffs' attorney to the District Court concerning the scope of the mandamus proceeding and their statements to the State Court belieing their representations. (*Civic Employees As-*

sociation v. *Windsor*, 353 U.S. 364, 77 S.Ct. 838, 1 L. ed. 2d 894).

In addition thereto the defendants filed other motions including a motion filed by the School Board that the Amended Supplemental Complaint be dismissed as to it upon the finding of the court in its memorandum opinion of August 23, 1961, that:

> "There is no evidence the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property. The prayer for injunctive relief is therefore denied."

And also the finding in the order of November 16, 1961, in which the court held:

> "There being no evidence that the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property, the plaintiffs' prayer for injunctive relief is denied."

The court having indicated that it would not dismiss the Amended Supplemental Complaint as to the School Board, the School Board moved under Rule 56 of the Rules of Civil Procedure for summary judgment in its favor on Paragraph 16 of the Amended Supplemental Complaint and dismissal thereof. The court granted that motion and by order of May 24, 1962 (R. 69), it found that there was no just reason for delay in disposing of that claim and it directed that final judgment in favor of the School Board on that cause of action be entered.

On July 25, 1962, the District Court handed down a

memorandum opinion—*Allen, et al* v. *County School Board, etc.*, 207 F. Supp. 349 (1962). It referred to the motion of the defendants that the court further abstain

> "upon the ground the petitioners deliberately failed and refused to comply with the order of this Court by deleting all federal questions from the suit filed in the Supreme Court of Appeals."

It overruled the motion saying that it "would be meritorious had the defendants filed an appropriate answer and/or countersuit to the plaintiffs' petition for writ of mandamus."

It held:

> "That the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers."

It having become certain that the plaintiffs would not institute proceedings in the state court required to obtain a decision of questions of state law involved in this case, either by the speedy remedy available to them of mandamus before the Supreme Court of Appeals or otherwise, the School Board filed a petition for declaratory judgment in the Circuit Court of the City of Richmond against some of the plaintiffs, the State Board of Education and the Superintendent of Public Instruction raising for decision the pertinent state questions.

On September 7, 1962, a hearing was had before the

District Judge. The pleadings in the case then pending in the state court were laid before the court and the defendants orally moved for further abstention. The plaintiffs presented an order which they asked the court to enter. At the same time they expressly disclaimed that they were asking for an injunction against the use of any of the moneys in the operation of public schools elsewhere in the State so long as schools may be closed in Prince Edward (Tr. 9/7/62, p. 90). The court took all matters under advisement.

Another hearing was held on October 3, 1962, at which time the defendants filed a motion entitled "Motion of Defendants to Amend the Findings Contained in the Memorandum Opinion of July 25, 1962, to Rehear and Reconsider in Part That Opinion, and to Abstain." In that motion all defendants requested the court to correct that opinion so as to state that the Board of Supervisors did file a proper answer in the mandamus case before the Supreme Court of Appeals and to reiterate the finding which the court had made in its decree of November 16, 1961, to which no party had taken objection. Next all defendants moved the court to reconsider and rehear their motion to dismiss or in the alternative to abstain from determining the issues presented in the Amended Supplemental Complaint upon the ground that the plaintiffs deliberately failed to comply with the court's order of November 16, 1961. Finally, all of the defendants moved that the court abstain from determining the issues presented until the courts of the Commonwealth of Virginia should have first passed upon the issues presented by the above-mentioned petition for declaratory judgment filed August 31, 1962, in the Circuit Court of the City of Richmond. Copies of the pleadings in that suit were filed with the motion.

On October 10, 1962, the Court handed down and entered a memorandum opinion and order (R. 82). (It is noted that the word "order" is omitted in the printing). The court overruled the motion filed on October 3, 1962. It did, however, correct one or two of the more egregious errors found in the opinion of July 25, 1962.

On the same day—October 10, 1962, the court entered another order by which it made certain formal findings of fact, and concluded that the closing of the public schools in Prince Edward County, under the circumstances and conditions there existing, is prohibited by the Fourteenth Amendment, and it adjudged, ordered and decreed:

> "that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court while the Commonwealth permits other public schools to remain open at the expense of the taxpayers."

The court deferred entry of any further order pending review in the Circuit Court and by the Supreme Court of its orders of October 10, 1962.

Assignments of error were made by all parties, plaintiff and defendant, and the case was duly appealed to the Court of Appeals, was argued on January 9, 1963 and by opinion rendered August 12, 1963 the court of Appeals held that:

> "These controlling questions of state law, uncertain and unsettled as they are, ought to be determined by the Supreme Court of Appeals of Virginia * * *."

It thereupon vacated the judgments of the District Court

and remanded the case with instructions to abstain until the Supreme Court of Appeals of Virginia "shall have decided the case now pending on its docket entitled *County School Board of Prince Edward County, Virginia, et al* v. *Leslie Francis Griffin, Sr., et al.*

The decision of the above-mentioned case in the Supreme Court of Appeals of Virginia—*County School Board of Prince Edward County, Virginia, et al.* v. *Leslie Francis Griffin, Sr., et al,* was rendered December 2, 1963. .....Va. ..... 133 S.E. 2d 565. This court granted certiorari on January 6, 1964 and granted a stay of the mandate of the Court of Appeals.

II.

QUESTIONS RAISED

Neither the brief of the petitioners nor the Amicus Curiae brief of the United States purports to deal with several important preliminary questions which have yet to be decided in this case, and as to which we believe we have a right to a decision. These preliminary questions are:

1. Does the Amended Supplemental Complaint state a new cause of action?

2. Is this a suit against the state prohibited by the Eleventh Amendment of the Constitution of the United States?

3. May the injunctions prayed for be granted except after a hearing before a three-judge statutory court?

These questions will be referred to herein, but are discussed in detail in the briefs of other defendants.

The following main questions are the principal subject of this brief:

4. Does the action of the Board of Supervisors of Prince Edward County in failing to levy taxes and appropriate local revenue for the operation of public schools, taken in light of the provisions of the Virginia State Scholarship Grant Law along with the local ordinances, violate rights of the petitioners under the Constitution of the United States?

5. May State or local scholarship grants be enjoined?

6. Does the judicial power extend to compel a legislative body to make a law, that is, to levy taxes and to appropriate local revenue?

III.

FACTS

Many of the broad general facts essential to an understanding of this case are set forth in the statement of the history of the case. In addition thereto, we accept the findings made by the District Judge in his opinion of August 23, 1961, beginning with the fourth paragraph from the bottom of page 58 of the record and running through the fifth paragraph on page 60 of the record. The one exception is the last paragraph on page 58 wherein it is stated that the private schools operated by the Prince Edward School Foundation during the year 1959-60 were "for white children only." It would have been accurate to say that those schools were attended by white children only.

In addition to these facts it is necessary to set forth the

additional facts which have intervened since this case was decided in the District Court and since the decision in the Court of Appeals.

The Supreme Court of Appeals of Virginia has defined the duties and responsibilities and the limits thereof imposed upon and granted to the General Assembly of Virginia, the State Board of Education, the Superintendent of Public Instruction, the County School Board and Superintendent of Schools and the Board of Supervisors.

It is first to be noted that the Constitution of Virginia vests all legislative power in the General Assembly of Virginia except to the extent that such legislative power is limited by the provisions of the Constitution of Virginia. Section 63 Constitution of Virginia.

The powers and duties and limitations thereon of each of the foregoing agencies of the State of Virginia are fixed by Article IX of the Constitution. These provisions of the Constitution are not only grants of authority, but they are limitations upon the powers of the General Assembly and of each of the other agencies of state and local government.

In *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S.E. 2d 227, and in *County School Board of Prince Edward County* v. *Leslie Francis Griffin, Sr., et al*, Va., 133 S.E. 2d 565, the Supreme Court of Appeals of Virginia has declared the final construction of these provisions of the Virginia Constitution.

As thus construed Section 141 of the Constitution of Virginia, put into effect by Section 22-115.29 through 22-115.37, provides for the payment of a sum ($225.00 elementary, $250.00 secondary) to the parents of chil-

dren between the ages of six and twenty years residing within the Commonwealth of Virginia for the education of children of the Commonwealth in "a non-sectarian private school located in or outside, or a public school located outside the locality in which such child resides." The parent and the child have complete freedom in the selection of the school and there is no element of race involved whatsoever. These funds are available to parents whether or not public schools are operated in the county of their residence.

The school boards are established by Section 133 and are given "the supervision of schools in each county and city." The local school board under Section 136 is given the power to expend funds appropriated to them "in establishing and maintaining such schools as in their judgment the public welfare may require."

The Board of Supervisors of the counties of Virginia in like manner are not creatures created by the General Assembly, but are established under the Constitution of Virginia. They are created by Article VII of the Constitution, under the title "Organization and Government of Counties", Section 111 of the Constitution of Virginia. By this section they are given the power to "lay county and district levies."

In *Griffin* v. *Board of Supervisors of Prince Edward County*, supra, the Supreme Court of Appeals held:

> "We find in neither Section 136 of the Constitution nor in the statutes implementing it, any support for the petitioners' contention that the Board of Supervisors is under the mandatory duty to levy local taxes and appropriate moneys for the support of public free schools in the county."

And in *County School Board of Prince Edward County* v. *Leslie Francis Griffin*, supra, the Supreme Court of Appeals reiterated its prior holding with this statement:

> "The Board of Supervisors, the governing body of Prince Edward County, has since the year 1958-59 refused to make appropriation of these necessary funds. It cannot be compelled to do so by the General Assembly, by this court, or by any authority except its own people."

With respect to the General Assembly in *County School Board of Prince Edward County* v. *Leslie Francis Griffin, Sr.*, supra, the court declared that the General Assembly had performed the duty imposed upon it by Section 129 of the Constitution of Virginia when it adopted the school code fixing a plan for the establishment and maintenance of a school system. It further held:

> "The only funds for the operation of public schools required to be furnished by the General Assembly are the three funds constituting the 'constitutional minimum' referred to above. (Section 135 Constitution of Virginia). As indicated above, Prince Edward county's share of these funds is wholly insufficient for operating the public schools in that county." * * *
>
> * * *
>
> "Section 135 authorizes the General Assembly to make such other appropriations for school purposes 'as it may deem best.' It has deemed it best to make such other appropriations on a conditional or matching basis, requiring the appropriation of funds by the lo-

calities, to be raised and expended as provided by §136 by local school authorities 'in establishing and maintaining such schools as in their judgment the public welfare may require.' "

As said by the trial judge in his very thorough opinion:

"Beginning with the Appropriation Act of 1916 (Acts of Assembly, 1961, Ch. 520), wherein the sum of $200,000 appropriated to the State Board of Education, to be apportioned to the counties for use by the local school authorities in the establishment of one and two room rural schools, was conditioned upon the local levies for county school purposes for the year aggregating a sum equal to or greater than the average rate of the levies of county school funds of the Commonwealth, and continuously since that time each successive Appropriation Act has required that county schools be in operation and that certain funds be levied, appropriated, or expended by the local governing body before any of the 'State' money becomes available. This makes the local governing body and through it, the people of the locality, the key to the public educational system of this Commonwealth."

"That this has consistently been the pattern of appropriation through the years may be seen by reference to Acts 1918, pp. 693-4, 727; Acts 1928, pp. 394, 458; Acts 1938, pp. 819-20, 890; Acts 1960, p. 995; Acts 1962, pp. 1334-6."

The court further held with respect to the state grants to parents in aid of the education of children:

> "We perceive nothing in or outside of the statutes to render these scholarships unavailable to any eligible child in Prince Edward County whether public free schools are operated in that county or not."

In sum, the State Constitution and law permits each locality in Virginia to provide for the education of its children by any of the following methods:

(1) By an appropriation of the local governing body to the local school board for the operation of public schools, in which event funds conditionally appropriated by the General Assembly are also available to the local school board for that purpose.

(2) By an appropriation of state and/or local funds to be paid to parents for the education of children in public or non-sectarian private schools of the parents' choice. (A minimum of $250 secondary and $225 elementary is provided).

(3) A combination of each of the foregoing methods, the state scholarship being in any event available to parents choosing to use them.

The remaining, and it is submitted, extremely important facts which have occurred since the opinion rendered in the Court of Appeals are the following facts which are well known to the Department of Justice and to counsel for the petitioners:

Through the cooperation of the Justice Department of the United States, the Governor of Virginia, Attorneys for the School Board of Prince Edward County and for

the Board of Supervisors of Prince Edward County with the approval of each of the said boards and with the cooperation of Negro leaders and officers of the NAACP in Prince Edward County, substantially all of the Negro children of the County have been in school since September, 1963, and will continue in school at least until September of 1964.

This school is operated by a non-profit corporate association chartered under the laws of the Commonwealth of Virginia under the management and direction of a Board of Trustees composed of Virginia Educators, three of whom are white: Honorable Colgate W. Darden, former Governor of Virginia and retired President of the University of Virginia, Dr. Fred B. Cole, President of Washington and Lee University, Dr. F. D. G. Ribble, Professor of law and former Dean of the University of Virginia Law School; three of whom are Negro: Dr. Earl H. McClenny, President of St. Paul's College, Lawrenceville, Virginia, Dr. Robert P. Daniel, President of Virginia State College, Petersburg, Virginia, and Dr. Thomas Henderson, President of Virginia Union University, Richmond, Virginia.

The faculty of this school is composed of both Negro and white teachers.

The student body of this school is composed of both white and Negro students.

The school is conducted in the two best and most modern school buildings owned by the School Board of Prince Edward County.

All school buses, laboratory equipment, and other teach-

ing aids owned by the School Board of Prince Edward County have been made available for the use of this school.

The School Board of Prince Edward County receives for the use of this property, valued at $2,250,000.00 only such sum as is estimated to be sufficient to cover the cost of insurance, maintenance, repairs and janitorial and custodial care of the property.

This school is presently financed by private contributions.

Education can be provided for children resident of Prince Edward County desiring to attend the said school for a regular nine months school term by the use of funds available through scholarship aid to parents under State and/or local law, provided; the school adopts a policy to charge tuition equal to the cost of operating the same, and provided, the parents of said children will apply for said funds and will pay said funds to the school for the education of the children in attendance.

IV.

ARGUMENT

1.

THE AMENDED SUPPLEMENTAL COMPLAINT PRESENTS A NEW AND DIFFERENT CAUSE OF ACTION FROM THAT PRESENTED IN THE ORIGINAL COMPLAINT AND SHOULD HAVE BEEN DISMISSED

The law and argument on this question will be discussed

in the brief filed on behalf of the School Board. We adopt what is said therein.

2.

THIS IS A SUIT AGAINST THE STATE PROHIBITED BY THE ELEVENTH AMENDMENT

The Board of Supervisors adopts the argument in the brief of the Attorney General of Virginia on this question.

3.

THE INJUNCTIONS PRAYED FOR IN THE AMENDED SUPPLEMENTAL COMPLAINT, THE INJUNCTIONS AWARDED BY THE DISTRICT COURT AND THE INJUNCTIVE RELIEF REQUESTED IN THE BRIEF OF THE PETITIONERS AND IN THE BRIEF OF THE DEPARTMENT OF JUSTICE MAY NOT BE GRANTED BY ANY COURT EXCEPT A THREE-JUDGE STATUTORY COURT

The law and argument on this question is to be presented in the brief of the Attorney General of Virginia, and the Board of Supervisors of Prince Edward County adopts that brief on this question.

4.

THE FAILURE OF THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY TO LEVY TAXES AND APPROPRIATE

FUNDS TO THE SCHOOL BOARD OF PRINCE EDWARD COUNTY FOR THE OPERATION OF PUBLIC SCHOOLS TOGETHER WITH THE STATE SCHOLARSHIP LAW AND THE LOCAL ORDINANCE APPROPRIATING FUNDS TO PARENTS IN FURTHERANCE OF THE EDUCATION OF CHILDREN DOES NOT VIOLATE RIGHTS OF THE PETITIONERS UNDER THE CONSTITUTION OF THE UNITED STATES

a. *What Are The Petitioners' Constitutional Rights Under Brown v. Board of Education?*

In each of the cases decided in *Brown v. Board of Education* admission to public schools had been denied under laws "requiring or permitting segregation according to race" in publicly owned and operated schools. The court said:

> "We now announce that such segregation is a denial of equal protection of the laws."

This decision removed all state restraint, based upon race, in admission and education in public schools. It was simply an enlargement of the liberty of both the white and the Negro race not to be denied access and use of public educational facilities on account of race.

This is made clear in the companion case of *Bolling v. Sharpe*, 347 U.S. 497, 98 L. ed 884. It conferred no affirmative right. It simply removed restraint upon liberty

based upon race and conferred equal rights upon all citizens regardless of race to have access to and to use public educational facilities.

The decision conferred no affirmative right upon members of any race to attend schools with members of another race, nor did it require that any state provide education for its children, nor did it prescribe or limit the reserved powers of the states to control the method by which the state would provide for the education of its citizens. It did nothing more than remove restraints, based upon race, upon the liberty of all our people.

This was the concept upon which Mr. Justice Harlan dissented in *Plessy* v. *Ferguson*, 163 U.S. 537, 41 L.ed. 256, where he said (163 U.S. 557):

> "The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens. 'Personal liberty,' it has been well said, 'consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.' 1 Bl. Com. 134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each."

Again, in his dissent in *Berea College* v. *Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.ed 81, at 211 U.S. 67 and 68 he says:

> "* * * This court has more than once said that the liberty guaranteed by the 14th Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' Allgeyer v. Louisiana, 165 U.S. 578, 41 L.ed. 832, 17 Sup. Ct. Rep. 427; Adair v. United States, 208 U.S. 161, 173, 52 L.ed. 436, 442, 28 Sup. Ct. Rep. 277. If pupils, of whatever race,—certainly, if they be citizens,—choose, with the consent of their parents, or voluntarily, to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose." * * *

The most classic and frequently quoted statement of what this court decided in *Brown* v. *Board of Education* is attributed to the late Chief Judge Parker of the Court of Appeals for the Fourth Circuit in *Briggs* v. *Elliott*, 132 F. Supp. 776 (1955):

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the state. It has not decided that the states must mix persons of different races in the schools or must deprive them of the right of choosing schools or must require them to attend schools or must deprive them of the rights of choosing the schools they attend. What it has decided, and *all that it has decided*, is that a state may not deny to any person on account of race the right to attend any school

> *that it maintains*. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but *if the schools which it maintains* are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. *The Constitution, in other words, does not require integration.* It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals." (Emphasis supplied)

Similar language was used by the Court of Appeals for the Eighth Circuit in *Byrd* v. *Sexton*, 277 F. 2d 418, 425 (1960), *cert. denied*, 364 U.S. 819, 5 L.ed. 2d 49, 81 S. Ct. 53. There, after quoting from Brown, the court said:

> "Neither that language nor the holding itself prescribes as a federal right the availability of education, let alone free education, through state facilities. The opinion stands for the proposition that only 'where the state has undertaken to provide it', the opportunity of an education 'is a right which must be made available to all on equal terms'."

The Court of Appeals for the Fifth Circuit decided the same thing in *Avery* v. *Wichita Falls Independent School District*, 241 F. 2d 230 (1957), when it said at page 233:

> "The Constitution as construed in the School Segregation Cases * * * forbids any state action requiring segregation of children in public schools on account of race; it does not, however, require actual integration of the races."

The Court of Appeals for the Fifth Circuit had before it the Dallas "Three-School" Case—*Boson* v. *Rippy*, 285 F. 2d 43 (1960). It said at pages 45-46:

> "Negro children have no constitutional right to the attendance of white children with them in public schools."

Certainly there is no more integrationist minded body in the whole United States than is the United States Commission on Civil Rights, one member of which was attorney for the Negro children in the school segregation cases. In Vol. 2 of the 1961 Commission on Civil Rights Report entitled *Education*, and at the bottom of page 17, the Commission discusses the fact that in Baltimore most pupils choose to attend the school in the neighborhood of their homes and therefore to a large extent the enrollment of the schools reflects residential patterns. This, of course, results in considerable separation of the races. The Commission points out that this is a case of separation resulting from free private choice and that the only legal vice in such operation is that which is required or compelled by law. It said:

> "Since there is no legal *compulsion* in their choice of schools, no constitutional question as to the desegregation plan seems to arise." (Emphasis supplied)

Expressions to the same effect may be found in the opinions of other federal courts. See *Dove* v. *Parham*, 181 F. Supp. 504, 513 (1960); *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209, 228, 229 (1959); *Thompson* v. *County School Board of Arlington*, 144 F. Supp. 239 (1956); *School Board of the City of Newport News* v. *Atkins*, 246 F. 2d 325 (1957); *Covington* v. *Edwards*, 165 F. Supp. 957 (1958), affirmed 264 F. 2d 780 (1959); *McKissick* v. *Durham City Board of Education*, 176 F. Supp. 3 (1959); *Wheeler* v. *Durham City Board of Education* and *Spaulding* v. *Durham City Board of Education*, 196 F. Supp. 71 (1961).

b. *Education And The Method By Which It Is Provided Is Exclusively A Matter Of State Determination*

It has never been controverted that the education of its children is exclusively a subject of state determination reserved to them under the Tenth Amendment of the Constitution of the United States.

In 78 C. J. S., Schools and School Districts, Section 12, page 624, is found the following statement:

> "The power to establish and maintain systems of common schools, to raise money for that purpose by taxation, and to govern, control, and regulate such schools when established is one of the powers not delegated to the United States by the federal Constitution, or prohibited by it to the states, but is reserved to the states respectively or to the people, and the people through the legislature and the constitution have the right to control, and prescribe the limits to which they will go in supplying education at public expense. Education

> is a subject of governmental concern and activity and a proper subject of legislation; in view of its important position in American civilization, it has been the subject of a great deal of legislation and many changes have been made in the laws from time to time to meet new conditions."

State control of education of its citizens has long been recognized by this court. *Barbier* v. *Connolly*, 113 U.S. 27, 31, 5 S.Ct. 57; *Interstate Consol. Street R. Co.* v. *Mass.*, 207 U.S. 79, 87, 28 S.Ct. 26; *Cumming* v. *County Board of Education*, 175 U.S. 528, 545, 20 S.Ct. 197.

The principle was affirmed in *Brown* v. *Board of Education:*

> "Today, education is perhaps the most important function of state and local government."

And again—

> "Where the state has undertaken to provide it, it is a right which must be made available to all on equal terms."

Likewise, in *Cooper* v. *Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.ed 2d 5:

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, . . ."

This power of the State over the education of its citizens

is a continuing power and the State may change and alter its policy and methods with respect to providing education for its citizens as the public need may require from time to time.

It is stated thus in 78 C. J. S., Schools and School Districts, Section 13, page 628:

> "The legislature's power is not exhausted by exercise, but a system may be changed, or one system substituted for another, as often as the legislature deems it necessary or expedient so to do. The system should be so maintained as to keep abreast with progress generally and to meet the needs of the times."

This power of the State to alter and to change the method by which it provides education is not impaired by any provision of the Constitution of the United States. It is, of course, true that whatever system the State provides may not violate the Fourteenth Amendment, however, the mere fact that the State chooses to change its system is not a subject controlled by the Constitution of the United States so long as the change conforms to the due process and equal protection clause of the Fourteenth Amendment.

In *Sperry & Hutchinson Co.* v. *Ada T. Rhodes*, 220 U.S. 502, 31 S.Ct. 490, 55 L. ed 561, Mr. Justice Holmes said:

> "* * * the 14th Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time."

Therefore, we conclude that the State has the whole power to determine by what means it shall provide for the education of its people, that there is no duty imposed upon the State under the Federal Constitution to make any provision for the education of its people, and that there is no limitation upon the power of the State to change, modify, enlarge or diminish the provisions which it makes with respect to the education which it will provide for its citizens. It is, of course, recognized that any provision made by the State for the education of its people must not violate the 14th Amendment of the Constitution of the United States.

c. *The Motive Of A Legislative Body Will Not Make Unconstitutional Legislation Which Is Otherwise Constitutional*

The petitioners and the Department of Justice to a lesser extent seem to rest their rights to relief in this case upon an alleged improper or unconstitutional motive on the part of the Board of Supervisors of Prince Edward County in refusing to levy taxes for public schools, and to a lesser extent upon the General Assembly and the Constitutional Convention of Virginia, which amended Section 141 of the Constitution in 1956. In some manner not delineated or specifically pointed out or supported by legal authority they appeal to the court to overthrow otherwise constitutional legislative action for the reason that such action is contaminated with a purpose to avoid teaching white and colored children together in public schools. They summarize this argument on page 32 of the petitioners' brief with the statement:

> "Public education in Prince Edward County was discontinued to abrogate, frustrate, avoid, and circumvent

> implementation of petitioners' right to equal educational opportunities."

They then assert that the Commonwealth of Virginia is providing, supporting and maintaining public schools in all localities of Virginia except Prince Edward County, thereby discriminating geographically against all students in the county.

The question of geographical inequality will be dealt with in due course.

Our contention here is that the motive or purpose of the legislative body, either local or state, is not a matter which the court will inquire into and is irrelevant upon the question of the constitutionality of the legislative action or inaction taken.

We do not contend that the purpose of an administrative agency is foreign or immaterial when one inquires into the question whether the administration of a law is unconstitutional. It is well and accurately said in *Snowden* v. *Hughes*, 321 U.S. 1 (1944), ...S.Ct....., ...L.ed. .....:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

Likewise, where a statute is obscure or ambiguous, the court in construing that statute may consider the legislative intent. *Merritt* v. *Welsh*, 104 U.S. 694.

What we do contend is this: That the right and power of a legislative body to adopt or to take legislative action is neither enlarged nor diminished by the motive and purpose of the body in adopting the legislation. The constitutionality of the legislation is to be determined by what the legislation provides and not by any motive or purpose which may have been in the minds of the legislative representatives.

For more than 100 years, indeed from 1810 to 1918, it was the settled law of this country that an act otherwise constitutional could not be rendered unconstitutional because of the motive or the purpose of the legislature in adopting the act. Then for a number of years the Supreme Court of the United States vacillated back and forth upon that point until finally in 1942 in one of the great decisions on "New Deal" legislation, the court apparently put to rest the contention that legislation otherwise constitutional could be rendered unconstitutional by the purpose or motive of the legislature in adopting it. The Supreme Court of the United States has not varied from that view. But strange to say, some of the lower federal courts, only in racial cases, has unearthed what we believe to be a legal heresy and has asserted that an improper motive or purpose may render legislation unconstitutional. See *NAACP* v. *Patty*, 159 F. Supp. 503 (1958), majority opinion by Judge Soper and dissent by Judge Hutcheson; reversed on other grounds in the Supreme Court of the United States—*Harrison* v. *NAACP*, 360 U.S. 167 (1959); *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, where the court said:

> "No one dare contest the sole purpose of all this legislation is to defeat the constitutional right of colored children to attend desegregated schools. Since such is their purpose, they are all unconstitutional."

Actually, in the foregoing case the schools involved were clearly public schools and the laws which were attacked were clearly statutes, the effect of which would deny equal liberty of white and Negro children to attend public schools and it was entirely unnecessary for the court to rest its decision upon any issue of legislative purpose or motive.

As briefly as possibly we will give the course of decision on this issue in the Supreme Court of the United States.

Like most things in constitutional law we begin with Chief Justice Marshall. He first dealt with this question in the famous case arising out of the Yazoo Land frauds, *Fletcher* v. *Peck*, 6 Cranch 87 (1810). He said:

> "It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice."

Next in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). It was seized upon in 1936 as authority for the proposition that an improper purpose dominating a legislature would result in the unconstitutionality of its enactments. Marshall's famous language was:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring

> such a decision come before it, to say that such an act was not the law of the land."

Perhaps the leading living student of our Constitution is Edward S. Corwin of Princeton University. In a rather amazing book published in 1936, entitled *The Commerce Power versus States Rights*, he points out at page 216, et seq., that by this language Marshall never meant to give support to the claim that the purpose of a constitutional body could affect the constitutionality of its actions. He points out, as does Beveridge in his John Marshall, Vol. 4, page 298, that in writing his decision in the *Bank* case Marshall relied heavily upon Hamilton's opinion of February 23, 1791, on the constitutionality of the Bank of the United States, and Mr. Corwin demonstrated that Marshall uses the word "objects" in the same sense in which Hamilton uses it, i.e., as meaning "subjects" or "powers" and that he does not mean "purpose" or "motive."

If any man understood the Supreme Court of his day, it was Daniel Webster. He had been leading counsel for the Bank in the *McCulloch* case. He labored under no illusions concerning what Marshall had meant. In his argument in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), Webster said:

> "Of course, there is no limit to the power to be derived from the purpose for which it is exercised. If exercised for one purpose, it may be also for another. No one may inquire into the motives which influenced sovereign authority. It is enough that such power manifests its will."

Here it is to be noted that the words "purpose" and

"motive" are used interchangeably as they are in many of the subsequent decisions of the Supreme Court of the United States. Mr. Corwin at page 213 of his book above cited says that in this context the words are interchangeable.

We jump to 1869 and *Veazie Bank* v. *Fenno*, 8 Wall. 533 (1869). That case involved a tax on bank circulation so heavy as to make it virtually certain that the notes of state banks would be eliminated from circulation. Reverdy Johnson and Caleb Cushing contended that the act was unconstitutional on the following ground:

> "Its excessive character, which is made evident by reference to the tax imposed on the circulation of the national banks already cited, proves that the true purpose of this tax is to destroy the state banks."

They were answered by the Court speaking through the then Chief Justice:

> "The first answer to this is that the Judicial cannot prescribe to the Legislative Departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected."

The real struggle began with the lottery case of *Champion* v. *Ames*, 188 U.S. 321 (1903). It was argued that:

> "The test of the validity of a statute is its real, and not its apparent, object."

using the word "object" as being synonymous with "purpose." This contention the majority swept aside, but it weighed heavily with the minority who said:

> "That the purpose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied. That purpose is avowed in the title of the act, and is its natural and reasonable effect, and by that its validity must be tested."

Two years later those who would write into our law the right of a court to determine the constitutionality of legislation by the supposed motives or purposes of the legislature returned to the attack in *McCray* v. *United States*, 195 U.S. 27 (1904). They were again rebuffed.

That case involved the constitutionality of an act placing a prohibitive tax on oleomargarine colored to resemble butter. The Court said:

> "It is, however, argued that if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power whenever it seems to the judicial mind that such lawful power has been abused. *But this*

reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."

* * *

"The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful *purpose* or *motive* has caused the power to be exerted." (Emphasis supplied)

Some of the similar cases prior to 1918 are *Hipolite Egg Co.* v. *United States*, 220 U.S. 45 (1911); *Hoke* v. *United States*, 227 U.S. 308 (1913); and *Weber* v. *Freed*, 239 U.S. 325 (1915).

The country was stunned in 1918 by *Hammer* v. *Dagenhart*, 247 U.S. 251, which involved an act prohibiting the shipment in interstate commerce of the products of child labor. The act was declared unconstitutional. Despite the disclaimer of the majority that:

"We have neither authority nor disposition to question the motives of Congress in enacting this legislation."

The minority in the famous dissent of Mr. Justice Holmes puts its finger upon what has since become regarded as the primary vice of that decision and said:

"In a very elaborate discussion the present Chief Justice excluded any inquiry into the the purpose of an act which, apart from that purpose, was within the power of Congress."

The court immediately returned to the sound views set forth in the earlier cases in its decision in *United States* v. *Doremus*, 249 U.S. 86 (1919); *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146 (1919); and *Smith* v. *Kansas City Title & T. Co.*, 255 U.S. 180 (1921).

Then in *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20 (1922), the child labor tax case, and despite the brilliant argument of that great constitutional lawyer Solicitor General Beck which Mr. Corwin (*op. cit.* p. 234) sets forth at some length, the court declared the legislation unconstitutional because of the purpose and the motive of the Congress. In *Linder* v. *United States*, 268 U.S. 5 (1925), it did likewise.

Then in a great opinion by Mr. Justice Brandeis, i.e., *Arizona* v. *California*, 283 U.S. 423 (1931), it swung back to the views of Chief Justice Marshall and Chief Justice White. Three years later over the dissent of Justices Cardozo, Brandeis and Stone, in *United States* v. *Constantine*, 296 U.S. 287 (1935), the court held that the motive and purpose of a legislative body was determinative of constitutionality. Then in *United States* v. *Butler*, 297 U.S. 1 (1936), seizing upon the language heretofore quoted from *McCulloch* v. *Maryland*, *supra*, the court declared the Agricultural Adjustment Act of 1933 unconstitutional because of the congressional purpose. In speaking of the child labor tax case, i.e., the *Bailey* case, the court said:

> "But their purpose was found to be to regulate the conduct of manufacturing and trading, not in interstate commerce, but in the states. * * *."

Hard upon the *Butler* case followed *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), which was to the same effect. Then the court in 1937 sought to slam the door upon this Pandora's Box which it had opened up, and in *Sonzinsky* v. *United States*, 300 U.S. 506 (1937), it held that motives of the legislative body had nothing to do with constitutionality, and in *United States* v. *Darby*, 213 U.S. 100 (1941), it is believed that the court finally extinguished the heresy which had begun with *Hammer* v. *Dagenhart*, *supra*, and it said in a great decision by Mr. Justice Stone:

> "The *motive* and *purpose* of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." (Emphasis supplied)

And the court expressly overruled the doctrine of *Hammer* v. *Dagenhart*, *supra*.

This view has been followed by the Supreme Court since that time. For instance see *United States* v. *Kahriger*, 345 U.S. 22 (1953), and the very interesting case of *United States* v. *Calamaro*, 354 U.S. 351 (1957), where the government contended that "pickup" men in the "number game" were covered by the gambling tax statute:

> "because its enactment was 'in part motivated by a congressional desire to suppress wagering.'"

The Court said:

> "* * * we would not be justified in resorting to collateral motives or effects which, standing apart from

> the taxing power, might place the constitutionality of this statute in doubt."

The Supreme Court in 1958 had before it the case of *Shuttlesworth* v. *Birmingham Board of Education*, 358 U.S. 101 (1958). There in a *per curiam* opinion of one sentence the three-judge District Court's opinion had been affirmed. That District Court had said (*Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (1958)).

> "In testing constitutionality 'we cannot undertake a search for motive.' 'If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into.' Doyle v. Continental Ins. Co., 94 U.S. 535, 541, 24 L.ed 148. As there is no one corporate mind of the legislature, there is in reality no single motive. Motives vary from one individual member of the legislature to another. Each member is required to 'be bound by Oath or Affirmation to support this Constitution.' Constitution of the United States, Article VI, Clause 3. Courts must presume that the legislators respect and abide by their oaths of office and that their motives are in support of the Constitution."

Some have thought that language quoted in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), from *Western U. Tel. Co.* v. *Foster*, 247 U.S. 105 (1918), was to the contrary. We do not so understand because in the *Western Union* case the statement was made by the court in response to the thought that a state might exclude the Telegraph Company from the use of streets unless the Telegraph Company would

submit to state regulation of its interstate activities. Of course, the surrender of constitutional rights can never be made the condition of a right to do anything.

d. *Virginia's System Of Education Fosters "Liberty" Protected By The First, Fifth And Fourteenth Amendment*

We are bold to say not only that the system of secondary education in effect today in Virginia and in Prince Edward violates no federal constitutional prohibition; it actually fosters and nourishes the "liberty" protected by the First, Fifth and Fourteenth Amendment.

The Virginia system is one in which public schools, if a locality sees fit to operate them, receive aid from the locality and from the state, and at the same time parents who desire their children to attend public schools outside the locality, or private, non-sectarian schools wherever located, if they apply therefor, may receive state scholarship grants (Code, § 22-115.30), and local scholarship grants (Code § 22-115.32), or local grants in aid of education, if the governing body of the locality so provides (Code, § 22-115.36).

The nature of this system is the same whether public schools are operated in the locality or not. The state scholarships are available in any event and the local governing body may supplement them if it chooses to appropriate more than its share thereof under the Code sections above referred to.

This system (1) aids the parents in availing themselves of a great "liberty"—the right to have their children edu-

cated in the manner and under the conditions which they select; (2) it fosters another of our cardinal liberties—the right to choose associates and associations. To a discussion of these rights we now turn.

The family has always been the principal dependence in western civilization for the rearing, and molding of the mind and character, of the child. This fundamental concept has been declared to be among the liberties protected against federal interference by the Fifth Amendment and protected against state interference by the Fourteenth Amendment.

The question first came before this court in 1923 in *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.ed 1042, and in *Bartels* v. *Iowa*, 262 U.S. 404, 43 S.Ct. 628, 67 L.ed 1047. The opinion of the court was written in *Meyer* v. *Nebraska*.

Meyer being a teacher in a German language school was arrested under a Nebraska statute making it unlawful to teach any child below the eighth grade in any language other than the English language. He was convicted. His conviction was affirmed by the Supreme Court of Nebraska, and thus the case came before the Supreme Court of the United States. In overthrowing the statute the court quoted the following general statement of those things which are included in the term "liberty" as used in the United States Constitution:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but

> also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge, to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." * * * (Emphasis supplied)

In declaring the Nebraska statute to be an invasion of the right of the appellant to teach and of children to acquire knowledge the court said:

> "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all—to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means." * * *

The two above cited cases were followed in 1925 by *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.ed 1070. A statute of the State of Oregon required all children of that State to attend *public schools operated by the State*. An injunction was sought against State officers to restrain enforcement of the statute by two corporate organizations. The cases were consolidated and heard together. The court said:

> "Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property." * * *

Having thus permitted the corporate complainants to assert the liberties of their patrons in the protection of their business and property the court laid down the following as a protected liberty of parents:

> "Under the doctrine of Meyer v. Nebraska, (supra), we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Then followed in 1927 the decision in *Farrington* v. *Tokushige*, 273 U.S. 289, 47 S.Ct. 406, 71 L.ed 646. The territory of Hawaii had enacted statutes requiring the payment of fees on the basis of the number of pupils attending schools taught in a foreign language and imposing other unreasonable and arbitrary restrictions upon such schools.

In declaring these statutes an invasion of protected liberties, the court said:

> "The general doctrine touching rights guaranteed by the 14th Amendment to owners, parents and children in respect of attendance upon schools has been announced in recent opinions. (Citing Meyer v. Nebraska, supra; Bartels v. Iowa, supra; Pierce v. Society of Sisters, supra.) While that Amendment declares that no state shall 'deprive any person of life, liberty or property without due process of law,' the inhibition of the 5th Amendment—'no person shall . . . be deprived of life, liberty or property without due process of law'—applies to the *federal government* and *agencies set up by Congress for the government of the territory.* Those fundamental rights of the individual which the cited cases declared were protected by the 14th Amendment from infringement by the states, are guaranteed by the 5th Amendment against action by the territorial legislature or officers. (Emphasis supplied)

Thus the whole circle is closed and the liberty of parents to choose the environment under which their children shall be educated and trained, and the teachers who shall provide education and training, is protected from interference by any governmental power, either state or federal. We here bring to the attention of the court that these decisions themselves limit the decision of this court in *Brown* v. *Board of Education* to the proposition that *Brown* v. *Board of Education* simply removed the power of the state to restrain the liberty of any person on account of race from access and use of public educational facilities. It could not require any

affirmative obligation of any citizen to be present or to attend a public educational facility because the principles declared in the three foregoing cases forbid the power of government, either federal or state, to be thus extended. Of course, these cases may be overruled and reversed, but it is not believed that the court had such a course in mind. A great deal will have to be retracted which has been said about liberty in other decisions if the court contemplates such a step.

For instance, in *United States* v. *Cruikshank*, 92 U.S. 542, 554, S.Ct. , 23 L.ed 589, the court made the following statement:

> "The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." * * *

There is another cornerstone of American liberty and of our democratic society which is fostered, implemented and made effective by the Virginia educational system and its scholarship grants to parents. We refer to the First Amendment freedom of speech, assembly and association.

In *DeJonge* v. *Oregon*, 229 U.S. 353, 57 S.Ct. 255, 81 L.ed 278 (1937), this court had before it a statute punishing participation in a meeting for lawful discussion of public issues because held under the auspices of an organization which advocated the employment of unlawful means

to effect industrial or political changes. The court said (299 U.S. 364):

> "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." * * *

Hague v. *CIO*, 307 U.S. 496, 83 L.ed 1423, 59 S.Ct. 954 (1939), involved a municipal ordinance reposing arbitrary powers in a municipal officer requiring a permit for a public assembly upon the public streets, highways, parks or buildings. In striking down this statute as an infringement of free speech and assembly, Mr. Justice Stone, in a concurring opinion in which he was joined by Chief Justice Hughes, stated:

> "It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose *are rights of personal liberty* secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment." (Citing nine (9) prior decisions of the court)

We next cite the case of *NAACP* v. *Alabama*, 357 U.S. 449, 2 L.ed 2d 1488, 78 S.Ct. 1163 (1958). An Alabama court had adjudged the NAACP in civil contempt for refusal to disclose the names and addresses of all its Alabama members and agents, etc. In a unanimous opinion by Mr. Justice Harlan the court said:

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is

> an inseparable aspect of 'liberty' assured by the due process clause of the 14th Amendment * * * Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, * * *"

Other cases suggestive of the same thought are *Shelton* v. *Tucker*, 364 U.S. 479, 5 L.ed 2d 231, 81 S.Ct. 247 (1960); *Bates* v. *Little Rock*, 361 U.S. 516, 4 L.ed 2d 480, 80 S.Ct. 412 (1960); *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 6 L.ed 2d 105, 81 S.Ct. (1961). See also *Communist Party* v. *SAC Board*, 367 U.S. 1, 6 L.ed 2d 625, 81 S.Ct. 1357.

The most recent case is *Gibson* v. *Florida Investigation Committee*, 372 U.S. 539, 9 L.ed 2d 926, 83 S.Ct. 889. In an opinion by Mr. Justice Goldberg the court declared:

> "'This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments." (Citations omitted)

In a concurring opinion, joined by Mr. Justice Black, Mr. Justice Douglas amplifies the protection extended to all lawful organizations (372 U.S. 562 & 563):

> "Joining a lawful organization, like attending a church, is an associational activity that comes within the purview of the First Amendment," * * *
>
> "* * * A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, eco-

nomic, religious, educational, and political programs are formulated."

And further at 372 U.S. 569, et seq, he says:

"The right of association has become a part of the bundle of rights protected by the First Amendment (citing NAACP v. Alabama, supra), and a need for a pervasive right of privacy against government intrusion has been recognized, though not always given the recognition it deserves. Unpopular groups (NAACP v. Alabama, supra) like popular ones are protected. Unpopular groups if forced to disclose their membership lists may suffer reprisals or other forms of public hostility. * * * But whether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter.

" 'Freedom of religion and freedom of speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone.' Public Utilities Com. v. Pollak, 343 U.S. 451, 467, 468, 96 L ed 1068, 1080, 72 S.Ct. 813 (dissenting opinion).

"There is no other course consistent with the Free Society envisioned by the First Amendment. For the views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces and the

people he associates with are no concern of government. That article of faith marks indeed the main difference between the Free Society which we espouse and the dictatorships both on the Left and on the Right."

Therefore, we respectfully submit that if motive is relevant, the motive here is a constitutional motive; that is a purpose to advance and enlarge protected liberty. If the parent has a right protected by the Fifth Amendment and by the Fourteenth Amendment to have a voice in the education and training of his child, then we say that Virginia is helping to make possible for the parent the exercise of that liberty. In doing so she does not violate the Constitution of the United States, she nourishes that liberty for which the Constitution itself was ordained.

e. *Virginia Does Not Violate The Fourteenth Amendment In Giving Each Locality An Option To Choose The Method By Which It Provides Education*

From what has been said heretofore, the following principles are established:

(1) The provision of education and the method by which it is provided lies wholly within the reserved powers of the State.

(2) The power is not exhausted by its exercise, but the State may alter the method by which it provides education in accordance with the welfare of its people.

(3) Any provision which the State makes must not

violate the principle laid down in *Brown* v. *Board of Education.*

(4) The principle decided in *Brown* v. *Board of Education* is that the State may not on racial grounds restrain the liberty of any person from access to an education in public schools.

(5) *Brown* does not require education in publicly owned and operated schools, nor does it require that any person attend publicly owned and operated schools.

(6) Motive or purpose of a legislative body does not make unconstitutional legislative action which is otherwise constitutional.

(7) The liberty of parents to select the teacher and the school in which the child is trained is protected against federal infringement by the Fifth Amendment and against state infringement by the Fourteenth Amendment, and the freedom to select associates and to be protected in one's associations is guaranteed by the First Amendment against federal infringement and by the Fourteenth against state infringement.

We agree with all that is said with respect to the importance of education. We submit, however, that its importance does not impair the Tenth Amendment reserves of the field of education to the states and to the people. If changes which have been wrought by time make education a matter essential to national defense or welfare, then let the National Congress make provision for it, and if the power to do so is not presently given or implied in the Constitution, then let the Constitution be amended appro-

priately. The laws of Virginia stand as evidence of the importance which Virginia places upon education, for her laws advance individual liberty and, by so doing, remove obstacles which otherwise would impair education. Her laws seeks to advance education and to fit the needs of all her people.

The Virginia plan for education provides scholarships to be paid to parents in furtherance of elementary and secondary education of Virginia students in public and nonsectarian private schools other than those owned or controlled by any county, city or town. These scholarships it provides for every parent regardless of place of residence, regardless of whether public schools are operated in the locality of residence or not, and with complete freedom to the parent in selection of the school in which their child is to be educated.

In addition, Virginia law permits any county or city electing to do so to maintain and to operate public schools. All of this is declared to be the law of Virginia by the Supreme Court of Appeals. *Griffin* v. *Board of Supervisors of Prince Edward County,* 203 Va. 321, 124 S.E. 2d 227, and *County School Board of Prince Edward County* v. *Griffin,* ..... Va. ....., 133 S.E. 2d 565.

The petitioners apparently have abandoned the contention implicit in their Amended Supplemental Bill of Complaint (1) that the Virginia law required the operation of public schools in Prince Edward County; and (2) that the closing of public schools in Prince Edward violated the order of April 22, 1960.

Petitioners' first contention, (Petitioners' brief p. 20) that due process requires education in public schools, is

advanced hopefully, but with no support of authority so construing the due process clause. The Department of Justice makes no such claim. We are content to rest our reply to this contention on what has been said and the authorities cited heretofore under a. and b. hereof.

The second contention of the petitioners (Petitioners' brief p. 22) is that by the exercise of the local option choice, given under the Virginia law to every county and city, by the Board of Supervisors of Prince Edward County not to levy taxes and appropriate funds for the operation of public schools is a violation of their Fourteenth Amendment rights because other counties and cities have not exercised their choice in the same manner. Therefore, say the petitioners, there is a territorial or geographical inequality and a constitutionally prohibited denial of equal protection of law. The Justice Department makes the same contention under "I" of its brief.

What we have already said in subtitle a. and b. hereof, it is submitted, disposes of this contention insofar as it is a contention that the Fourteenth Amendment requires the operation of public schools or, in fact, the provision of any form of public education.

In *James* v. *Almond*, 170 F. Supp. 331, the three-judge District Court declared:

> "We do not suggest that, aside from the Constitution of Virginia, the State must maintain a public school system. That is a matter for State determination."

And Judge Lewis, in his opinion in this case dismissing the Justice Department, stated: (R. 174)

> "This Court knows of no provision of the United States Constitution which provides that the states shall provide a system of free public education and none has been cited."

It, therefore, follows that the Constitution of the United States imposes no obligation upon the Commonwealth of Virginia to operate public schools. Since Virginia is under no such constitutional obligation she is free to refer to the various political subdivisions of the state through their governing bodies the option or choice as to the method by which education is to be provided in the particular locality.

The election of the governing body is not an election to have no education, it is simply an election not to have education in schools owned, operated and controlled by the local governing body, but to provide education through furtherance of the liberty of parents to select the school in which the child will be educated. It is respectfully submitted that such local option provisions of state law are not in conflict with the Fourteenth Amendment.

In *Ft. Smith L. & T. Co.* v. *Board of Improvement*, 274 U.S. 387, 47 S.Ct. 595, 71 L.ed 1115, the court said:

> "The 14th Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state." (The court then cites seven (7) of its own decisions and a great number of state decisions).

Other cases to the same effect are *Salsburg* v. *Maryland*, 346 U.S. 545, 74 S.Ct. 280, 98 L.ed 281 (1953); *Ohio ex*

rel. Lloyd v. Dollison, 194 U.S. 445, 48 L.ed 1060, 24 S.Ct. 703.

In *Missouri* v. *Lewis* (Bowman v. Lewis) 101 U.S. 22, 25 L.ed 989, there was a contention that the judicial system of the State of Missouri violated the Fourteenth Amendment in that litigants in certain courts of St. Louis and neighboring counties were denied the right of appeal to the Supreme Court of Missouri while litigants in other courts of other counties of the State in similar cases had such right of appeal. The court declared:

> "* * * It (the Fourteenth Amendment) contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a State from arranging and parceling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the prohibition that 'No state shall deny to any person within its jurisdiction the equal protection of the laws.' It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions; provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States; and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the

appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdiction have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government." * * *

"The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. * * * A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State." * * *

So it is respectfully submitted that education and the method by which it is provided, being exclusively and solely an area of legislation reserved to the states, there can be no objection based upon the fact that in one county education is provided by one method and in another county it is provided by another method. Such local laws being uniform within the territorial subdivision do not violate any federally protected right, nor do they violate the Fourteenth Amendment.

In *Ohio ex rel. Lloyd* v. *Dollison*, 194 U.S. 445, 24 S.Ct. 703, 48 L.ed 1060, the court had before it an Ohio law which permitted political subdivisions of the State to prohibit the sale of alcoholic beverages. Dollison was arrested for violating one of these local statutes. He advanced the contention that to make an act a crime in one political subdivision and for the State to permit it in another territory or political subdivision was a denial of equal protection under the Fourteenth Amendment. The court said:

> "This objection goes to the power of the state to pass a local option law; which, we think, is not an open question. The power of the state over the liquor traffic we have had occasion very recently to decide. We said, affirming prior cases, the sale of liquor by retail may be absolutely prohibited by a state. Cronin v. Adams, 192 U.S. 108, 24 S.Ct. 219. That being so, the power to prohibit it conditionally was asserted, and the local option law of the state of Texas sustained."

See *Rippey* v. *Texas*, 193 U.S. 504, 48 L.ed 767, 24 S.Ct. 516.

We do not need to go so far as to meet the question of the State's power to do away with education for its citizens entirely and to leave that wholly for private provision, for Virginia merely gives an option as to the method of providing education.

If, as we think may not be controverted, education is a matter lying wholly within the determination of the State, then there is no question of the right of the State to give to each political subdivision an option of choice of methods for its provision.

The decision of the local subdivision not to operate public schools, but to provide for education by scholarship aid to parents, being uniform in its application within the territorial limits of Prince Edward County, clearly under these decisions of the Supreme Court does not violate the Fourteenth Amendment.

The fact that other localities may exercise the choice given them differently from the manner in which it has been exercised in Prince Edward County in no way effects the principle laid down in these decisions. Clearly, these provisions of Virginia law, which have been fixed in the Constitution of the State of Virginia for over sixty years, do not infringe rights guaranteed by the Fourteenth Amendment. It has been so held in numerous controlling decisions of the lower federal courts. *Tonkins* v. *City of Greensboro*, 162 F. Supp. 549, aff'd. per curiam 4 Cir., 276 F. 2d 890; *Gilmore* v. *City of Montgomery*, 176 F. Supp. 776, aff'd. 5 Cir., 277 F. 2d 364; *Clark* v. *Flory*, 141 F. Supp. 248, aff'd. per curiam 4 Cir., 237 F. 2d 597; *Willie* v. *Harris County*, 202 F. Supp. 549; *Hampton* v. *City of Jacksonville*, 304 F. 2d 319; *Hampton* v. *City of Jacksonville*, 304 F. 2d 320.

We will not undertake to analyze all of these cases. The principle is laid down in *Tonkins* v. *City of Greensboro*, *supra*. The City of Greensboro sold a swimming pool for the sole purpose of avoiding the duty imposed upon it to permit use of the pool by both Negro and white residents. In holding that this action did not violate any right of the Negro complainant, the court said:

> "In the final analysis, the plaintiffs can only complain of discrimination or unequal treatment. If the swimming pools are closed to all, or disposed of through a

bona fide public sale, there can be no unequal treatment and, therefore, no racial discrimination. No citizen of Greensboro will have access to municipal swimming facilities.

"Unless persons under the same circumstances and conditions are treated differently there can be no discrimination. No person has any constitutional right to swim in a public pool. All citizens do have the right, however, if a public swimming pool is provided, not to be barred therefrom solely because of race or color. If the swimming pools are closed or sold, the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone."

To the same effect are the other cases cited. Since these cases will be analyzed in the brief filed on behalf of the Attorney General, we will not extend this brief by a detailed analysis of each of these cases.

Nothing has been decided in the other school cases cited by the petitioners and the Attorney General which is in conflict with the contentions here made. In none of those cases was it held that the powers of either the State or the political subdivision are frozen so that they must operate public schools and so that they may not alter the method of education so as to provide scholarships paid to parents in aid of the education of children.

James v. *Almond*, 170 F. Supp. 331, decided in 1959 contemporaneously with *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636, declared unconstitutional a fundamental part of Virginia's "massive resistance" program, and *Harrison* v. *Day* destroyed the remainder thereof. Under Virginia

statutes the Governor undertook to take over schools in the City of Norfolk (a part of that city's school system) when those schools were ordered to be integrated. The court held that this constituted a violation of the equal protection rights of the petitioners. The court did not undertake to examine the Virginia constitutional arrangement for the operation of public schools, since the discrimination here was present on a local basis in that integrated schools were closed and other schools and grades were left open. The court said:

> "In so holding we have considered only the Constitution of the United States as it is unnecessary, in our opinion, to pass upon the specific provisions of the Constitution of Virginia which deal directly with the free public school system of the state. We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system. That is a matter for state determination." * * *

It further said at page 339:

> "Where a state or local government undertakes to provide public schools, it has the obligation to furnish such education to all in the class eligible therefor on an equal basis." * * * *

So that this opinion is not a holding that the Virginia school system is a centrally owned, controlled and operated school system, nor is it a holding that local optional control of the method of providing education is a violation of the Fourteenth Amendment. The decision, therefore, does not meet and is not authority for the issues here under consideration.

James v. *Duckworth*, 170 F. Supp. 342, is equally inapplicable.

In that case the City Council of Norfolk had levied the tax and made an appropriation to the Norfolk School Board of public funds for the operation of the Norfolk City Schools. It undertook to adopt a resolution cutting off this appropriation for use in any school which was integrated. The court simply held that this resolution, being racial in character, was a violation of the Fourteenth Amendment and was void. The effect was to remove interference with and continue in force the prior appropriation to the school board. Plainly, this decision has nothing to do with the issues here.

We cannot extend this brief by a detailed analysis of all the enactments and litigation which arose from the effort of the State of Arkansas to continue segregated public schools. It is sufficient to say that in all those cases the effort was to transfer public school buildings and public school funds into the hands of private cooperatives for the operation of public schools. These schools retaining their public nature, all these statutes were held unconstitutional.

One of these cases apparently most relied upon by the petitioners is *Aaron* v. *McKinley*, 173 F. Supp. 944. That opinion begins with a finding that the Constitution of the State of Arkansas sets up a centrally operated, financed and controlled system of public schools for the education of the people of Arkansas. There was no effort to alter this fundamental arrangement for education and consequently no question involving a change in the method of education was involved in that case. What was involved were statutes closing public schools which might be integrated and leaving other schools in the district open, cutting off funds from

schools which might be integrated, but still leaving funds available for other schools in the district. These statutes were declared unconstitutional.

Bush v. *Orleans Parish School Board*, 190 F. Supp. 861, is another example of an effort to operate public schools on a segregated basis. An act of the legislature undertook to vest primary control of New Orleans schools in the legislature itself, "under the very acts and resolutions already declared unconstitutional by this court, and, to create, for fiscal matters, a new school board." The legislature also attempted to deny the school board control of its own funds which had been lawfully appropriated to it and which were deposited in local banks. They also undertook to replace the attorney for the school board with an attorney selected by the legislature. Again, there was no question of local choice in the method of providing education. There was no question of the power of an autonomous local body to close schools and to provide education by scholarship grants to parents. Involved only was a raw exercise of state power to compel the operation of public schools with public moneys under control of state agencies in violation of the holding of the Supreme Court in *Brown* v. *Board of Education*.

Hall, v. *St. Helena Parish School Board*, 197 F. Supp. 649, is no different and represents another such effort. The controlling fact in that opinion again is the quotation from the Louisiana Constitution contained in the opinion:

> "The Legislature shall have full authority to make provision for the education of the school children of this State and/or for an educational system which shall include all public schools * * * operated by State agencies * * *."

It quoted from some Louisiana decisions construing this constitutional provision:

> "Public education is by the Constitution to be an affair of the State, and *it assumes the whole responsibility of public education* * * *." (Emphasis supplied)

It found as a fact:

> "There can be no doubt about the character of education in Louisiana as a State, and not a local, function. The Louisiana public school system is administered on a statewide basis, financed out of funds collected on a statewide basis, under the control and supervision of public officials exercising statewide authority under the Louisiana Constitution and appropriate State legislation."

In the face of these provisions of its own Constitution, Louisiana undertook to enact a so-called local option law, and the related legislation, the court said was "designed to continue racial segregation in the public schools, in spite of the desegregation order of this court." This act provided for a vote of the people of the parish on the question of closing schools. It also provided that in event of an affirmative vote, the parish board might sell or lease the schools on such terms as it might prescribe, "presumably" said the court, "to educational cooperatives, created pursuant to Act 257 of 1958 which would operate the schools." These cooperative schools, said the court, "are to be supervised by the parish school boards under the State Board of Education." The court pointed out in the opinion:

> *"Financial aid is direct from state to schools; tuition*

checks are to be made out by the state jointly to the parent and the school." (Emphasis supplied)

The state was to furnish children in the so-called private schools with school lunches and with transportation. And, the court said:

> "The program is to be administered by the State Board of Education with the assistance of each local board."

Under another of the Acts "the salaries to be paid teachers, bus drivers, school lunch workers, janitors and other school personnel in the 'private' school were established by state legislation."

By another Act it was made a crime for any person to advise parents to send children to an integrated school. Of this arrangement this court said:

> "Of necessity, the scheme required such extensive state control, financial aid, and active participation that in operating the program the State would still be providing public education." * * *

The holding of the court was that equal protection in *Brown* v. *Board of Education* was violated by the operation of public schools under the guise of "private" schools. The court did not hold that public schools must be operated. It did not hold that there is a requirement for operation of schools attended by both white and Negro children. It did not hold that the state could not grant to a locality at the option of its governing body the choice or option to educate all children within the territorial juris-

diction either in public schools or, if it so elect, by the payment of scholarship grants to parents for the education of children in schools of the parents' choice.

So that it is submitted that nothing in any of these cases meets or controls the issues raised in this case.

The Attorney General, in his brief, takes the position that the exercise of the local option granted under Virginia law in this case is not permissible under the Fourteenth Amendment for two reasons:

First, because the territorial classification is arbitrary and capricious; and, second, because the reason or motive or purpose is to preserve segregation and that this contaminates the option exercised.

We have already dealt with the law applicable to the consideration of motive in determination of the constitutionality of legislative action. We will now undertake further consideration of these objections.

The Board of Supervisors of Prince Edward County have not acted in defiance of any court order. They take an oath to support the Constitution of the United States, as do all public officers of the State of Virginia. (§49-1, Code of Virginia, 1950) Their official actions, like the laws enacted by all legislative bodies, are presumed to be constitutional and this presumption applies to the motives which prompt their action. There is nothing of defiance or unconstitutionality in a decision of that Board to adopt a method for the education of children which enables parents to exercise the liberty of choice of the school in which their children are educated—a liberty protected under both the First and

Fifth Amendments to the Constitution of the United States, and against State action under the Fourteenth Amendment.

The provision of the Constitution of Virginia giving the local Board of Supervisors absolute control over the appropriation of funds for the operation of public schools and giving the local School Board absolute control of the establishment, maintenance and operation of the schools themselves is predicated upon a basic fact which it is not believed will be controverted by any person.

The success of a local educational program depends upon the cooperation and support of the people of the locality and an effective educational program cannot be conducted without that support. This necessity the second opinion in *Brown* v. *Board of Education* recognized and directed that it should be given consideration.

Prince Edward County is a typical southern rural Virginia county. The Negro people of the county are not separated by residence as they are in the urban areas of the large cities of the east and midwest, nor even to the extent that they are so residentially separated in the urban areas of the south.

This record shows that there are approximately 1800 Negro school children and approximately 1300 white school children in the county. There is no constitutional method, or at least so it has appeared to the Board of Supervisors of Prince Edward County, by which public schools could be operated in the county in accord with the provisions of *Brown* v. *Board of Education* except to assign pupils to school on the basis of their residence. In Prince Edward this would result in immediate and complete and total in-

tegration. The effect thereof, and it is submitted that the Board of Supervisors of Prince Edward are in a better position to judge this than any other body anywhere, would be the complete destruction of education in the county. Believing as they do that parents have a constitutionally protected right to rear their children and to provide for the education and training of their children in schools of the parents' choice, they saw no alternative under the law except to exercise the option granted under the Virginia school plan and to implement the liberty of parents to choose the schools of their children. It is submitted that this is not an unconstitutional motive, but that it is a judgment controlled by realities and by facts which must be recognized by any responsible body undertaking to provide for education under the conditions as they actually exist in Prince Edward County.

If these are not a sufficient factual basis upon which to justify the exercise of the option provided under Virginia law, then we refer the court to the expressions of those of greater knowledge and learning.

The Virginia "Freedom of Choice" program for education is not a new concept or innovation created by Virginia. It is the method suggested by John Stuart Mill for universal education in his "Essay on Liberty" (N. Y., Appleton, Century, Crofts, 1947), p. 108, et seq. It is the method that has been used by the Congress of the United States for the education of members of the Armed Forces of the United States after World War II and the Korean War. (See Servicemen's Adjustment Act, 38 USCA 1501, et seq.). It is the method provided by the Congress in the National Defense Education Act of 1958. It cannot be characterized as a method of education which is designed to discriminate

because, as a matter of law, it furthers and enhances complete and absolute freedom of choice without let or hindrance.

Some of the advantages of such a system of education are discussed in great detail in an article published in the "New Individualist Review", Vol. 3 No. 1 Summer 1963, Ida Noyes Hall, University of Chicago, Chicago 37, Illinois, by Professor Robert L. Cunningham, an associate professor of Philosophy at the University of San Francisco. He gives the following as advantages of the method of education:

(1) Effective control of the education of the child is in the hands of the parents.

(2) It eliminates the possibility of dangerous public control of the power of the state to dominate the formation of the minds of the young.

(3) It would introduce a competitive element into the elementary and secondary school program which would improve the quality of education for all.

(4) It would result in an economy in education.

He also discusses in this article some of the criticisms such as the suggestion that such a plan would be "divisive". He does not find that these criticisms are justified.

Professor Milton Friedman of the University of Chicago in his recent book *"Capitalism And Freedom"*, advocates a system of education substantially similar to that provided under the Virginia law in Chapter 6 under the title, "The Role of Government in Education". In the following chapter

entitled "Capitalism and Discrimination", he concludes the chapter with the following comment upon the Virginia "Freedom of Choice" plan:

> "Segregation in schooling raises a particular problem not covered by the previous comments for one reason only. The reason is that schooling is, under present circumstances, primarily operated and administered by government. This means that government must make an explicit decision. It must either enforce segregation or enforce integration. Both seem to me bad solutions. Those of us who believe that color of skin is an irrelevant characteristic and that it is desirable for all to recognize this, yet who also believe in individual freedom, are therefore faced with a dilemma. If one must choose between the evils of enforced segregation or enforced integration, I myself would find it impossible not to choose integration.
>
> "The preceding chapter, written initially without any regard at all to the problem of segregation or integration, gives the appropriate solution that permits the avoidance of both evils—a nice illustration of how arrangements designed to enhance freedom in general cope with problems of freedom in particular. The appropriate solution is to eliminate government operation of the schools and permit parents to choose the kind of school they want their children to attend. In addition, of course, we should all of us, insofar as we possibly can, try by behavior and speech to foster the growth of attitudes and opinions that would lead mixed schools to become the rule and segregated schools the rare exception.
>
> "If a proposal like that of the preceding chapter were

adopted, it would permit a variety of schools to develop, some all white, some all Negro, some mixed. It would permit the transition from one collection of schools to another—hopefully to mixed schools—to be gradual as community attitudes changed. It would avoid the harsh political conflict that has been doing so much to raise social tensions and disrupt the community. It would in this special area, as the market does in general, permit co-operation without conformity.

"The state of Virginia has adopted a plan having many features in common with that outlined in the preceding chapter. Though adopted for the purpose of avoiding compulsory integration, I predict that the ultimate effects of the law will be very different—after all, the difference between result and intention is one of the primary justifications of a free society; it is desirable to let men follow the bent of their own interests because there is no way of predicting where they will come out. Indeed, even in the early stages there have been surprises. I have been told that one of the first requests for a voucher to finance a change of school was by a parent transferring a child from a segregated to an integrated school. The transfer was requested not for this purpose but simply because the integrated school happened to be the better school educationally. Looking further ahead, if the voucher system is not abolished, Virginia will provide an experiment to test the conclusions of the preceding chapter. If those conclusions are right, we should see a flowering of the schools available in Virginia, with an increase in their diversity, a substantial if not spectacular rise in the quality of the leading schools, and a later rise in the

quality of the rest under the impetus of the leaders.

"On the other side of the picture, we should not be so naive as to suppose that deep-seated values and beliefs can be uprooted in short measure by law. I live in Chicago. Chicago has no law compelling segregation. Its laws require integration. Yet in fact the public schools of Chicago are probably as thoroughly segregated as the schools of most Southern cities. There is almost no doubt at all that if the Virginia system were introduced in Chicago, the result would be an appreciable decrease in segregation, and a great widening in the opportunities available to the ablest and most ambitious Negro youth."

It is to be borne in mind that the court is here dealing not simply with Prince Edward County and what it might feel is a recalcitrance on its part, but the issue and the resolution of it will have national effect. The more narrow this court draws the limits around the power of the state to alter and to change its program of education, the more rigid and the less elastic becomes the opportunity of all states, consequently of the American education system, to experiment and to adjust to not only racial and sociological problems, but to scientific changes and to the increased knowledge which we are so rapidly acquiring of the processes of learning.

If states and localities are to be required to teach only in school houses owned, operated and controlled by state or political subdivisions, the opportunities of growth in the technical and scientific methods of teaching and learning will be to that extent limited. Virginia at this very moment is spending large sums of money in study and experiment

with closed circuit television and its teaching advantages. What the future holds in this field, as in so many others, no man can guess.

The Constitution of the United States is designed to live forever and to bestow upon the people of our country the blessings of liberty. It has not been the experience of history that to increase the liberty of our people threatens danger, but that on the contrary the growth and development of America has been the result of the freedom which our Constitution was designed to protect for all generations.

It is not possible to limit the freedom of parents in Prince Edward County without limiting the freedom of America. It is not possible to restrain and to confine the educational methods of the Commonwealth of Virginia to a school building owned, operated and controlled by a state agency without restraining and confining the liberty of all states within the same limits.

So that we submit that the motives and purposes which lie behind the action of the State of Virginia in providing a freedom of choice to parents in education are not reprehensible motives nor are they acts of defiance, and the reasons for the adoption of the freedom of choice program in Virginia and the reasons for its introduction into Prince Edward County support it as a constitutional exercise of a local option power and its classification is neither capricious nor arbitrary, but is supported by the most salient and controlling facts.

Even those who feel that the decision in *Brown v. Board of Education* was legally and morally wise and judicious

are compelled to recognize the great problem which it thrusts into the educational system of those areas of our country whose customs and laws for so long a time, under the sanction of the Constitution, provided for the separation of the races in education. The sociological consequences and results of that decision are just beginning to become apparent. They are by no means limited to the South. We all know that the instincts of parents to protect and to nurture their children are inherent and however misguided may be their responses when they are thus based upon native instinct, common to all mankind, the results of compulsion upon them cannot be estimated. If laws which give parents freedom to educate their children in private or public schools of their choice are to be struck down because a majority of those parents in the exercise of their freedom may make a particular choice, then there is truly no freedom in this respect and *Pierce* v. *Society of Sisters*, supra, and *Farrington* v. *Tokushige*, supra, are meaningless. If because parents in the exercise of such freedom may choose all white or all Negro or mixed schools is to be seized upon as an unlawful legislative motive which contaminates with unconstitutionality an otherwise protected freedom, then the result will be a difference in the reserved powers of the states of the Union, depending upon the particular manner in which the citizens of a state may exercise the liberty of choice. Legislation granting freedom to parents to choose the school in which the child is educated would be constitutional in states which do not have the problem here involved, or in just the manner that Prince Edward County has the problem, and would be unconstitutional in those states and communities which do. This would result in a difference of state powers based solely upon the decision of a federal court sitting in judgment of the motives of

the legislative body and of the motives of the parents in the exercise of protected liberty. Such a result would itself be violative of the United States Constitution, for that instrument contemplates "equal states" with equal reserved powers.

It is contended that there is an unconstitutional inequality which results to all citizens of Prince Edward County, and that this inequality is caused by the failure of the Board of Supervisors to levy taxes and appropriate funds for schools and results in an unconstitutional effect.

We now pass to a consideration of this question.

f. Any Inequality In Prince Edward County Is Not The Result Of Action Of The Board Of Supervisors Or Of the State

We have established the following legal conclusions:

(1) That the entire field of education is reserved to the states or to the people under the Tenth Amendment.

(2) Education being wholly a matter within the powers of the state, it also has the power to delegate to each local subdivision the choice of the method by which education shall be provided within its territorial limits, and such delegation of authority does not violate the Constitution of the United States.

(3) That differences or inequality resulting from such delegation of power as between one political subdivision and another political subdivision resulting from the different choices made by such political subdivision do not violate the Fourteenth Amendment.

In addition, the Fourteenth Amendment has no application to private action, but is wholly limited to inequality or differences resulting from state law. No inequality is claimed to exist within the county or between the citizens of the county itself, and none could be, for all were affected alike when the public schools were closed. They were closed for all and scholarships in aid of education were available to all on equal terms.

As a result of purely private decision and private action some of the children of the county have been receiving an education, and as a result of private action and private decision other children, specifically the petitioners, have experienced a lack of education. All of this has been the result of private choice and private decision and is not the result of any inequality of law either in the provisions of the law itself or in the result or effect of law within the county itself. So much at least appears to be admitted (except, of course, as to the contention that there is a federal requirement to provide education in public schools operated by the state, which we have heretofore considered in a. and b. above).

The contention is that there is a geographical inequality. Any inequality resulting from a comparison of education provided within Prince Edward County with education provided outside the county we submit does not fall within the Fourteenth Amendment prohibitions.

The reason is that inequality within the county being due to the private choice of parents refusing to utilize the scholarships available and refusing to accept the means provided for the education of their children, the same inequality or lack of education remains the result of private

action when compared with education in any other political subdivision, whatever may be the means by which education is provided in such other political subdivision.

To state it differently, the burden is upon the petitioners to show that the Fourteenth Amendment is violated. The burden is upon them to produce evidence to show that the lack of education of which they complain is the result of law and is not the result of their own private refusal to accept the means provided by law for their education. This they cannot show for the facts demonstrate the exact opposite to be the truth.

The school buildings owned by the School Board have been offered for the use of petitioners at no expense. (R. 176) The money to employ teachers and faculty has been available through scholarships. All that has been lacking has been the cooperation and acceptance by the petitioners of the scholarship funds provided.

There is presently in operation within the county a private school which provides education equal to that offered anywhere in Virginia. The same facilities are available with scholarship funds, which are now supported by private contributions. All that is required to provide the same education which is now being provided in the county by private contributions is that the school make a tuition charge and the parents apply for the scholarship funds. The demonstration is conclusive that any lack of education heretofore or in the future is not the result or effect of the means provided by law, but is and will be the result and effect of a private refusal of parents to accept and utilize the means provided.

The school buildings are and will be available. The faculty is and will be available. The money is and will be available.

The lower court found that there were 1800 Negro children who were not in school. Assuming 600 of these to be high school and 1200 elementary, at the minimum provided under the scholarship law there is $420,000.00 available annually, in addition to the buildings presently in use.

The Justice Department points out in its brief that the per pupil cost in the Foundation schools for the year 1959-60 was $216.09. With the buildings made available by the School Board, the cost of providing education for petitioners would certainly be no more than the scholarship funds available.

So that it is submitted that any lack of education for petitioners is the result of private decision and is not the result of any law in force in Prince Edward County. This private decision is the cause of any difference which results within the county and is necessarily the cause of any claimed inequality in comparison with any other county. The record permits no other factual conclusion.

5.

STATUTES AND ORDINANCES PROVIDING SCHOLARSHIPS TO BE PAID TO PARENTS IN FURTHERANCE OF THE EDUCATION OF THEIR CHILDREN IN SCHOOLS OF THEIR CHOICE MAY NOT BE ENJOINED

Before going to the principal issue raised under this subject, we wish to briefly mention the tax credit ordinance

and the local scholarship ordinance, each enacted by the Board of Supervisors in July, 1960.

Since the ordinance granting the tax credits for contributions to non-profit, non-sectarian, private schools within the county has been repealed by resolution of the Board of Supervisors adopted on the 3rd day of September, 1963,[1] we will make no detailed argument in that connection, but will simply observe that such contributions have not heretofore been held to constitute support of the institution by reason of a governmental agency allowing a tax credit therefor. Such has always been both the federal and state law.

We also wish to make a brief preliminary observation with respect to the scholarship ordinance enacted by the county. The ordinance provided for the payment of exactly the amount from county funds which the state would have made from funds otherwise coming to the county from state sources other than school funds or welfare funds. (Code §22-115.29 thru 22-115.35).

Parents whose children attended schools eligible to re-

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[1] At a regular meeting of the Board of Supervisors of Prince Edward County, held at the Court House thereof, on Tuesday, the 3rd day of September, 1963, the following resolution was, upon the motion of Mr. Gates, seconded by Mr. Dillon, unanimously adopted:

RESOLVED: That an Ordinance adopted by this Board on the 18th day of July, 1960, providing for certain tax credits for contributions made to private non-sectarian schools located within Prince Edward County be and the same is hereby repealed.

A Copy Teste:

VERNON C. WOMACK, *Clerk*
Board of Supervisors, Prince Edward County, Virginia.

ceive the state grants got exactly the same amount of money, that is $150.00 state funds plus $100.00 county funds for high school education, and $125.00 of state funds and $100.00 of county funds regardless of whether the local ordinance was enacted or not. By reason of the ordinance they got the $100.00 additional county fund directly from the county rather than receiving it from the state with the result that the state would have withheld an equal amount of money from funds above mentioned which were otherwise due the county. So that the enactment of the county ordinance resulted in no benefit to children eligible to receive the minimum state grants. On the other hand, the parents of children attending schools not eligible to receive state scholarships became eligible to receive the county funds by reason of the fact that the county ordinance was much more liberal with respect to the requirements of the type of school attended by such children than were the requirements of the state. The county ordinance (R. 150-154) reserved large discretion to the Board of Supervisors as to the qualification of the school attended by the child, required only a "systematic course of education or training", and was, in fact, an effort to aid those parents whose children might attend schools which would not qualify under state law for state scholarships (R. 190 through 194).

The reason for setting forth these facts is simply to show that no inference may be drawn from the adoption of the county ordinance of a purpose to aid the parents of children attending the Prince Edward Foundation schools for it gave them no benefit which they did not already enjoy. On the other hand, it conferred benefits upon parents whose children were not eligible for state grants and is, therefore, clearly evidence of an effort by the Board of

Supervisors to aid petitioners in any effort they might make to provide education for their children. This assistance also petitioners refused to accept.

This brings us to a consideration of the state scholarship grant laws and the principle question of whether or not this court may enjoin the scholarships to parents provided by those laws.

We do not here consider the question of jurisdiction under 28 USCA 2281, which is discussed in the brief of the Attorney General of Virginia, and which we adopt for that purpose.

The first contention which we advance is that the petitioners have no standing to challenge the constitutionality of the Virginia scholarship grant law in this case. The jurisdiction of the District Court was invoked under 28 USCA 1331 and 42 USCA 1981, under 28 USCA 1343 (3) and 42 USCA 1983. The jurisdiction is, therefore, to redress the deprivation under color of state law of rights secured by the Constitution of the United States or its laws.

The Virginia statutes providing for the payment of scholarships to parents are equally applicable to petitioners and are not in any wise related to race or other unconstitutional classification. Petitioners do not contend that there is any inequality either in the scholarship grant laws themselves, nor do they contend that there has been or is any inequality in the administration of these laws.

None of the petitioners has ever applied for admission to any school attended by the children of parents who receive scholarships under these state statutes, neither in Prince Edward County nor elsewhere.

It is, therefore, clear that the tuition grant laws of the State of Virginia do not deprive petitioners of any right secured to them under the Constitution or laws of the United States. It is true that the evidence in this case suggests that it was the purpose of those who organized the schools of the Prince Edward Education Foundation to provide education for white children, nonetheless, there is no evidence that this policy or this purpose would be made effective with respect to the application of any child or children for admission to that school. If petitioners are entitled to admission to the Foundation School they have not sought the exercise of that right and, therefore, they have not been and are not being deprived of that right. If and when that question should come before the court it would involve consideration of a great many problems and factual elements which are not developed in the evidence in this case, and the right of admission of the petitioners to the Foundation Schools is not the subject of this litigation.

It is, therefore, respectfully submitted that the record fails to show that the petitioners have been deprived of any right secured under the Constitution of the United States or its laws by these statutes. *Tileston* v. *Ullman*, 318 U.S. 44, 46, 87 L. ed 603, 604, 63 S.Ct. 493; *Standard Stock Food Co.* v. *Wright*, 225 U.S. 540, 550, 56 L.ed 1197, 32 S.Ct. 784; *United States* v. *Raines*, 362 U.S. 17, 22, 4 L.ed 2d 524, 529, 80 S.Ct. 519.

Certainly the court may not grant the injunctions sought by the petitioners. The petitioners ask the court to enjoin the payment of state scholarships to parents for the education of children in schools which do not admit students because of race. We have found no case of a remotely

similar character asking a court for an injunction of such a nature. To grant the injunction in that form would constitute, in effect, an amendment of the Virginia tuition grant law by injunction. It would require that this court write into the Virginia statutes a restriction upon the use of scholarship grants, which restriction is not a part of the law as enacted by the legislature.

The statute may be attacked in a proper suit for that purpose as a violation of the rights of any person or class of persons who feel that their rights are violated by the statute. The court would then have to determine whether or not the statute as drawn violates those rights. If the court concluded that the statute did violate constitutional rights, then it would be within the power of the court to enjoin the execution or enforcement of the statute as a violation of constitutional rights, but, it is submitted, that in no event could the court by the exercise of the judicial power, in effect, rewrite the statute in accordance with the court's notion of what might be necessary to make the statute conform to its judgment with respect to the provisions of the Constitution.

The injunction, therefore, prayed for by the petitioners clearly may not be granted.

Furthermore, as has been pointed out heretofore in this brief, (4. Sub-paragraph d.), these scholarship laws being paid to parents without any racial restraint whatsoever upon their selection of the school in which their child would be educated is in furtherance of a protected freedom of those parents. If parents in their private capacity have the protected right and liberty under the Fifth Amendment of the Constitution of the United States to choose a private

school which does not admit children on a racial ground, then this liberty may not be impaired by a judgment of a federal court any more than it could be impaired by an act of Congress, (see *Farrington* v. *Tokushige, supra*), or by a state law, (see *Meyer* v. *Nebraska, supra*). If the grant may be denied for the use of a parent in a private school which excludes Negro children, it also may be enjoined in a school which excludes white children, and it may be enjoined in a school for those who speak the Japanese language or for those who speak the German language.

If under the First Amendment there is a freedom of association, then people of the Negro race have a right to associate privately to the exclusion of people of the white race and, the converse would also be true. In this area free choice to associate or not to associate as one may privately choose are preferred and protected freedoms and to put the restraint upon such freedom which would result from the injunction prayed for by the petitioners would be a gross violation of the fundamental liberty guaranteed to all persons within the jurisdiction of the United States.

Furthermore, this court has said in *Frost* v. *Railroad Commission*, 271 U.S. 583 at 594, 70 L.ed 1101 at 1105, 46 S.Ct. 605, in dealing with an effort by the State of California to deny the use of its highways to private carriers unless such private carriers submitted to regulation as common carriers:

> "But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the

> surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

The converse of this is also true. Neither the Congress nor the federal courts can impose as a condition upon the exercise of the First Amendment freedom of association and the Fifth Amendment liberty of parents that they give up and surrender a portion of that liberty in order to enjoy a benefit granted by the state. If a state may not thus restrict and condition liberties protected under the Constitution of the United States, surely no agency of the United States may restrict the exercise of those liberties as a condition for the enjoyment of a general public benefit provided by the state.

It is not necessary to cite the multitude of cases in which this court has struck down state statutes imposing a condition upon the exercise of the right of freedom of speech.

As has been heretofore pointed out, freedom of speech and freedom of association are "cognate rights". In like manner, a federal court cannot impose a restraint or a condition upon free association as a condition to the enjoyment of a state benefit; in this instance, scholarships paid to parents with freedom to select the school and the associations of children.

The Justice Department suggests that the court may impose a restriction upon this First Amendment freedom of association and upon the liberty of parents with respect to the training of children based upon whether or not

public schools are in operation within the county of the residence of those seeking to enjoy those protected liberties. The Attorney General says that the enjoyment of these liberties, fostered by scholarship grants under state law, should not be permitted so long as public schools are closed in Prince Edward County. It is submitted that this conditioning of protected liberty and First Amendment freedom is not permissible whether it comes from a state source or from a federal source. Whether public schools are opened or closed is no basis upon which to deny protected freedom. If the closing of public schools violates the Constitution of the United States, and we think most emphatically that it does not under the circumstances here shown, that is one issue, but the existence of public schools or the non-existence of public schools may not properly be related as a condition to fundamental freedoms protected by the Constitution of the United States.

It is, therefore, respectfully submitted that the Virginia scholarship grants may not be enjoined in this litigation.

6.

DOES THE JUDICIAL POWER EXTEND TO COMPEL A LEGISLATIVE BRANCH TO MAKE A LAW, PARTICULARLY TO LEVY TAXES AND TO APPROPRIATE LOCAL REVENUE?

Nobody has ever suggested before, so far as we have been able to investigate the cases, that this court, or any other court, has the power to compel a legislative body to levy a tax and to appropriate the revenue derived therefrom against their will and without their consent.

Section 6 of Article I of the Virginia Bill of Rights as drawn by George Mason and continued in the Constitution of Virginia throughout its history down to the present day, provides as follows:

> "That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage, and *cannot be taxed* or deprived of, or damaged in, their property for public use, *without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good.*" (Emphasis supplied)

Section 5 of the same Bill of Rights provides as follows:

> "That the Legislative, Executive and Judicial Departments of the State should be separate and distinct; * * *"

The division of the Legislative, Executive and Judicial Departments on the federal level is provided in the Constitution of the United States and the principle requiring consent through the representatives of the people to all taxes is carried into the Constitution of the United States in Section 7, Article I:

> "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills."

As we said above, the principle of consent through elected representatives as a fundamental prerequisite for the

imposition of taxes has never been directly challenged. The matter was discussed, however, in the case of *Thomas* v. *Gay*, 169 U.S. 264, 42 L.ed 740. Here the question arose with respect to the application of a tax imposed upon each head of cattle grazing upon certain territorial lands under the jurisdiction of the territory of Oklahoma. The claim was made that the people of the territory had no representative who had consented to the tax. The court said:

> "The most fundamental of these objections is found in the assertion that, so far as nonresident owners of cattle grazing within the Indian reservations are concerned, it is taxation without representation, and that such persons derive no benefit from the expenditure of the moneys accruing from the tax." * * *
>
> "But these principles, as practically administered, do not mean that no person, man, woman, or child, resident or nonresident, shall be taxed, unless he was represented by someone for whom he had actually voted, nor do they mean that no man's property can be taxed unless some benefit to him personally can be pointed out." * * *

We cite the case merely to show that the principle is recognized as fundamental.

The petitioners undertake to surmount this barrier by citing a series of cases which have absolutely no application to the issue here raised.

In every one of the cases cited in the brief of the petitioners on page 33, and by the Attorney General in "III 2." of its brief, there was involved a contract and a mone-

tary judgment thereon. The law on this subject is stated thus in 12 Am. Jur., § 418, page 50:

> "§418. Taxing Power as Inherent Part of Contract. —In accord with the general rule that existing laws become an integral part of the obligation of a contract, the laws relating to the rights of enforcement existing at the time of the issuance of municipal bonds under the authority of which they are issued enter into and become a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired or its fulfilment hampered or obstructed by a change in the law. As a result, when a contract is made with a municipal corporation on the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition as to the impairment of the obligation of contracts. Therefore, the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature; or if they are changed, a substantial equivalent must be provided. Likewise, where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States and is null and void. This rule is applicable regardless of whether the legislative action is taken by the municipality or by state legislation which repeals or limits the statute authorizing the municipality to levy

taxes. The creditors of the municipality does not always have a right to have the taxes collected in the same manner as they were always collected, but he does have the right under his contract to have taxes collected in as prompt and efficacious a manner as provided at the time the contract was executed. Thus, any act which attempts to put off or retard the enforcement of a municipality's obligations by postponing the power of the city to levy taxes impairs the obligation of contract."

There is no question in these cases involving the consent of the legislative body to the levy of the tax. In these cases contracts either for the issuance and payment of bonds were entered into not in the governmental capacity of the political subdivision, but in its corporate capacity, and the contract having been entered into, the consent to pay the obligation and therefore to levy the tax necessary to pay is an inherent part of the contract itself and any change in the law with respect to the taxing power of the municipality is regarded as a prohibited impairment of the contract under the Constitution of the United States, and any refusal to levy the tax is likewise regarded as an impairment of the contract obligation, all of which is in violation of express provisions of the Constitution of the United States.

In short, the consent and obligation to levy the tax was fixed by the acceptance and commitment of the contract to pay. The enforcement by mandamus of a levy of the tax becomes in such cases a mere "ministerial act" which the courts under recognized principles of law may direct to be done.

These cases do not meet in any way the question which is suggested by the petitioners that the judiciary has the power to compel the levy of taxes without the consent of those to be taxed. Until some act may be pointed to which constitutes a consent and a commitment of the legislative tax levying authority or of the people themselves to the levy of the tax, no court has yet assumed the power as a part of its judicial authority to issue an order directing such a tax levying body to make a levy of taxes and to appropriate the revenue therefrom to a governmental purpose.

See the following authorities upon the subject of Judicial Control of the legislative power:

Where the legislative act is discretionary:

34 Am. Jur., Mandamus, § 66, 67, 68, 854 through 858

Where the legislative act is mandatory:

11 Am. Jur., Constitutional Law, § 76, 694
11 Am. Jur., Constitutional Law, § 200, 902
16 C. J. S., Constitutional Law, § 151(1), 721
Anno: 136 ALR 677
Anno: 140 ALR 439
Anno: 153 ALR 522

Levy of taxes is a legislative act not subject to judicial control:

51 Am. Jur., Taxation, § 46, 76
84 C.J.S., Taxation, § 7, 51
Anno: 32 LRA (NS) 1020

The famous case of *Virginia* v. *West Virginia*, 246 U.S. 565, 62 L.ed 882, 38 S.Ct. 400, is cited as authority to support such a power in the court. A recitation of the facts from which that case arose will make clear that it does not apply here.

This case was before the Supreme Court of the United States on nine different occasions and nine different opinions were rendered before the court rendered the opinion at the citation above given.

The litigation involved the demand of the State of Virginia that the State of West Virginia pay its proportionate part of certain indebtedness in bonds, outstanding obligations of the State of Virginia at the time West Virginia was carved out of the State of Virginia and became a separate state. The grounds of the claim are stated in an opinion by Mr. Justice Holmes in 220 U.S. 1, 25, 55 L.ed 353, 357. In substance, they are as follows:

After Virginia adopted its ordinance of secession, citizens of the area which became West Virginia organized a government which was recognized as the restored State of Virginia by the government of the United States. A convention of this restored state was convened and adopted an ordinance for the formation of a new state, which ordinance obligated the new state to "take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861." A constitution was framed for the new state which provided "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this state." Finally, Congress,

by an act of December 31, 1862, Chapter 6, 12 Stat. L. 633, gave its consent to the admission of the State of West Virginia with express approval of the consent of the restored State of Virginia to pay its part of the debt as provided by the ordinance above referred to and the constitution above quoted from. Upon this basis, the court held that the above quoted provisions of the ordinance of the restored State of Virginia and the Constitution of the new State of West Virginia with the approval by Congress constituted a binding obligation and promise of West Virginia to pay to Virginia her proportionate part of the public debt aforesaid. It was upon the basis of this contractual obligation that the court proceeded to determine through commissioners the fair proportion of the public debt of Virginia which should be paid by West Virginia, and after determining the amount the judgment was fixed for a sum in excess of $12,000,000.00. West Virginia continued recalcitrant to pay this judgment.

It was upon this background that the last opinion rendered by Chief Justice White at 246 U.S. 565, must be judged. We note the fact that there is no question in that case, or in any of the opinions, of the agreement of West Virginia to pay the debt. There is no question but that the Constitution of West Virginia provided that it should pay the debt, and there is no question of the fact that Congress admitted West Virginia with the understanding fixed in its Constitution that it would pay the debt. It, therefore, appears that there was fixed in the fundamental law of West Virginia through its duly elected representatives to a Constitutional Convention, a consent to the obligation, and, therefore, a consent to pay the obligation. Upon this basis therefore, the question is eliminated from the case

of *Virginia* v. *West Virginia* of imposing a tax without the consent of the representatives of the people upon whom the tax was to be levied. Consent to the tax had been given in the highest form of representation known, namely, in its Constitution, and the obligation to impose the tax to pay the debt assumed was thus fixed in its Constitution. The case, therefore, is clearly distinguished from the case here before the court.

The case is further distinguished from the issue here by the fact that the Constitution of the United States expressly confers upon the Supreme Court jurisdiction to render judgments in controversies between states, and the judgment having been rendered, the court was then confronted with the problem of how to enforce it. With respect to the exercise of judicial power upon the sovereignty of the state, the court made the following observation:

> "As it is certain that governmental powers reserved to the states by the Constitution—their sovereignty —were the efficient cause of the general rule by which they were subject to judicial power, that is, to be impleaded, it must follow that when the constitution gave original jurisdiction to this court to entertain at the instance of one state a suit against another, it must have been intended to modify the general rule: that is, to bring the states and their governmental authority within the exceptional judicial power which was created. No other rational explanation can be given for the provision."

It is, therefore, submitted that the opinion recognized that the sovereignty or political powers of the state are not

subject to judicial process except in the exceptional instance where jurisdiction is conferred directly upon the Supreme Court of controversies between states.

The court then proceeds, at page 600, to discuss the appropriate means for the enforcement of its judgment. It divides the possible means of enforcement into the legislative powers of Congress and the judicial power of the court. Congressional powers to enforce the judgment are predicated upon the approval of Congress, of the agreement between the restored State of Virginia and the new State of West Virginia; and the court concludes that the power to make valid that agreement carried with it Congressional powers to enforce it.

Without quoting at length from the opinion, at every point in the opinion the court returns to the foundation of the obligation as resting upon contracts consented to by the authorized representatives of the State of West Virginia.

In an article by Professor *Thomas Reed Powell*, 17 Mich. Law Review 1, "Coercing A State To Pay A Judgment: Virginia v. West Virginia," he concludes that the mandamus asked for by Virginia and appropriate to the case would have been a mandamus to require West Virginia *to pay the judgment*. Since, as he points out, West Virginia could pay the judgment either by levying a tax for the purpose of paying or by issuing bonds for payment. As to these alternative methods, West Virginia would have discretion, but under the judgment of the court West Virginia had no discretion as to payment.

Professor Powell says at page 22 of Volume 17 Mich. Law Review:

> "The duty which the legislature of West Virginia is now asked to perform is enjoined upon it by the law of West Virginia as embodied in its Constitution. The legislature is subject to the law of the constitution as the municipality is subject to the law of the legislature. The legislature is in the present situation an 'inferior authority' in the same sense in which the cases and the text-writers have used that term in referring to persons subject to mandamus. The duty is imposed upon it by the superior authority of the Constitution."

So that *Virginia* v. *West Virginia* is distinguished from the case here before the court in that there is a consent of the representatives of the people to the obligation which the jurisdiction of the Supreme Court of the United States reduced to judgment, and a mandamus requiring the payment of the judgment would not be a mandamus requiring an act to which the people of West Virginia had not consented through their representatives.

Virginia v. *West Virginia* stands for the proposition that while under the particular facts of that case the Supreme Court of the United States could direct the payment of the judgment, it could not control the discretion of West Virginia as to the method of payment. That is, it could not direct, on the one hand, that the legislature levy a tax, or, on the other hand, that the legislature issue bonds. It could only require under the broadest interpretation of the opinion cited that the legislature make provision for the payment of the judgment.

Even if the opinion in *Virginia* v. *West Virginia* were applicable here (and we think it is not because the element of consent to the payment of the judgment was implicit in the West Virginia Constitution), it would only authorize

a federal court to say that the Constitution and law of Virginia requires education, and it might follow therefrom in a proper case that a mandamus could be directed to the appropriate state officers to provide education, but where the State Constitution and State law authorize education to be provided either by the operation of public schools or by the payment of scholarship funds to parents in furtherance of education in schools of the parents' choice or by a combination of both methods, a mandamus could not lie to control the legislative discretion as to the method by which education is provided.

Such a mandamus is not required in this case for the obvious reason that Virginia is providing education within the terms of Virginia's Constitution and Virginia's law. The people of Virginia in her Constitution and in the enactments of the Legislature have consented that Virginia should provide education. They have not consented, however, that any county or city must provide education in any particular manner, and since the method and manner by which education is to be provided is within the reserved powers of the state, a federal court is not authorized to control the legislative discretion by directing that it be provided in a particular manner; namely, by the operation of publicly owned and maintained schools, and much less is it authorized without the consent of a legislative body to direct that taxes be levied and money be appropriated to operate such public schools.

It is further respectfully submitted that the language of the Fourteenth Amendment is negative and prohibitory. It gives the federal courts and the federal Congress power to prevent the denial of life, liberty or property without due process of law and to prevent the denial of equal protection of the law by the state. Such a provision, under the

decisions of this court, cannot be converted into authority to prescribe what a state must provide. In other words, a prohibition that no state shall deny equal protection of the law is not authority to Congress or to the federal courts to prescribe and affirmatively impose upon the states the laws which shall be enacted to provide equal protection or due process. So the Fourteenth Amendment has been interpreted from the beginning. Civil Rights Cases, 109 U.S. 1, 27 L.ed 836, ...S.Ct..... See *Wilkerson* v. *Rahrer*, 140 U.S. 546, 35 L.ed 572; *Barbier* v. *Connolly*, 113 U.S. 27, 31, 28 L.ed 924; *Ownby* v. *Morgan*, 256 U.S. 94, 112, 65 L.ed 837; *United States* v. *Harris*, 106 U.S. 629, 27 L.ed 290; *McPherson* v. *Blacker*, 146 U.S. 1, 36 L.ed 869.

CONCLUSION

Virginia law gives each locality the option to choose the method by which education will be provided for its residents. The Virginia scholarship statutes are predicated upon the constitutionally protected right of each individual parent to select the schools in which his child is educated. It eliminates the element of compulsion which results where parents may only choose between integrated public schools and private education at the parents' expense. It is the only constitutional means which has been found which holds out real hope that the educational problem of our country resulting from the radical changes wrought by *Brown* v. *Board of Education* may be solved. It is characteristic of the genius of our Constitution that the solution of such problems lie in the broadening and extending of American freedom and not in its constriction.

We close this brief with the earnest prayer that this freedom which Virginia law tries to foster will not be

taken away by this Court and with the following wise and eloquent quotation from the opinion of the late Mr. Justice Jackson speaking for the Court in *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 640, 87 L. ed. 1628, 1639, 63 S. Ct. 1178:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> "It seems trite but necessary to say that the First

Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."

BOARD OF SUPERVISORS OF
PRINCE EDWARD COUNTY

By: J. SEGAR GRAVATT
Special Counsel
Blackstone, Virginia

WILLIAM F. WATKINS, JR.
Commonwealth's Attorney
of Prince Edward County
Farmville, Virginia

NOTE: The limitations of time have contributed to the imperfections of this brief. It is too lengthy and the material is inadequately organized and presented. This we regret and ask the indulgence of the court.

In its preparation we have drawn whole sections from the work of Collins Denny, Jr., who was counsel for the School Board of Prince Edward County until his death on January 14, 1964. His magnificent talent and legal ability is a loss to the adequate presentation of the important constitutional issues here before the court. We acknowledge our indebtedness to him in the effort here made.

J. SEGAR GRAVATT